UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC., Plaintiff, v. ANTHONY A. WILLIAMS, *et al*., Defendants.	)	Civil Action No. 05-0338 (EGS)

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO
PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION AND
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The defendants herein (collectively, "the District"), by and through undersigned counsel), hereby submit this Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction and in Opposition to Plaintiff's Motion for Summary Judgment, in accordance with LCvR 7.1(b) and (d), and LCvR 65.1(c).

As required by LCvR 56.1, defendants' Opposition to Plaintiff's Statement of Material Facts As to Which There is No Genuine Issue ("PSMF") has been provided, as has defendants' Statement of Material Facts as to Which There is a Genuine Dispute.

I. Introduction and Summary of Argument

"Because of its status as home to all three branches of the Federal government, as well as numerous Federal buildings, foreign embassies, multinational institutions, and national monuments of iconic significance, the Washington, DC, Metropolitan Area continues to be an

obvious high priority target for terrorists." Department of Homeland Security ("DHS"), Enhanced Security Procedures for Operations at Certain Airports in the Washington, D.C., Metropolitan Area Flight Restricted Zone, 50 Fed. Reg. 7150, 7152–53 (Feb. 10, 2005).

Plaintiff here seeks to prevent the District from protecting its citizens from this unique terrorism threat. This is not a case of impermissible regulation of railroad operations, but of the District exercising its traditional police powers.

The District's legislation is not preempted. Contrary to plaintiff's hazy representations, the federal government has not acted in the area that the District seeks to regulate—the rerouting of hazardous materials to reduce the risk of a catastrophic terrorist attack.[1] In fact, after the attacks of 9/11, Congress expressly authorized states to act to enhance transportation security.

Plaintiff has not met its burden here. Plaintiff's evidence does not meet the threshold showing of irreparable harm necessary for the grant of emergency injunctive relief. The minimal "evidence" presented is vague, inconsistent, and largely unsupported. Many of plaintiff's arguments require the resolution of material factual disputes, which precludes the grant of summary judgment here.

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[1] Indeed, over the past few years, and as recently as the past few weeks, security experts have repeatedly expressed deep concern that this particular terrorist threat has not yet been effectively addressed by the federal government. On January 26, 2005, a former DHS official warned that while DHS has now taken significant measures to improve *aviation* security, it has left other terrorist targets vulnerable. According to the official, one threat "stands out above the rest as uniquely dangerous and accurately vulnerable, and that's hazardous chemicals, in particular toxic-by-inhalation chemicals"—"World War I era chemical weapons, which we move through our cities in extraordinarily large quantities and quite low security." Testimony of Richard A. Falkenrath (formerly Deputy Homeland Security Advisor and Deputy Assistant to the President (2003–2004)), testimony before the Senate Homeland Security and Governmental Affairs Committee, Jan. 26, 2005) (available at http://www.brookings.edu/dybdocroot/views/testimony/fellows/falkenrath20050126.pdf).

As CSXT acknowledges, the United States Capitol is "the quintessential symbol" of American government. Plaintiff's Memorandum in Support of its Motion for Preliminary Injunction ("PI Memo") at 31. The challenged District law reduces the known risk to that symbol and the District residents and visitors in the surrounding area—the risk of a terrorist attack on hazardous materials traveling through the District.

The District shows in detail below that the legal principles CSXT invokes—and the evidence it presented—do not justify a preliminary injunction against the District. Although CSXT claims the Act represents an impermissible burden on interstate commerce, plaintiff confuses the "burdens" the District law places on CSXT with a burden on interstate commerce. The minimal added cost and delay associated with routing around the Capitol Exclusion Zone are not disproportionate when balanced against the public interest in avoiding a catastrophic terrorist attack in a densely populated area that has already been, and remains, a high-risk terrorist target. *See infra*, 50 Fed. Reg. at 7152–53. At any rate, plaintiff has presented no credible evidence on that cost and delay.

Plaintiff's maximum "burden" amounts to the potential rerouting of just 0.16% of its total national rail traffic, or just 2.3% of its total national hazardous-material traffic, by number of cars. *See* Complaint ¶¶ 7, 67.[2] Even more startling, plaintiff's answers to the District's

[2] The District is constrained to use the word "maximum" here because, in the short course of this litigation, plaintiff produced several sets of conflicting numbers as to how many of its cars would potentially be affected by the challenged District law. According to the Complaint, the law could affect 11,400 of CSXT's cars per year, out of over 7,000,000 total carloads of freight and about 500,000 carloads of hazardous materials. *Id*. CSXT originally alleged (before the Surface Transportation Board ("STB")) that the Act would affect 10,500 loaded and empty cars. PEx. 14 to PI Memo, at 9.

The deposition of CSXT's affiant revealed that the "burden" alleged is actually *higher* than the true "burden," and the number of rail cars requiring rerouting is *lower* than that alleged (because plaintiff's initial numbers failed to take into account the voluntary rerouting). Deposition of John M. Gibson, Jr., dated Mar. 3, 2005 ("Gibson Depo.") at 105 (excerpt attached

interrogatories reveal that even the "burden" identified in the Gibson Deposition are inflated. *See* Shuman Decl. ¶ 23e.

The legislation at issue is a reasonable response to a threat identified by the federal government. The Federal Bureau of Investigation ("FBI") has reported that terrorists are specifically interested in "targeting hazardous material containers" in attacks on rail cars on U.S. soil. Statement of Councilmember Patterson on Introduction ("Council Intro."), "The Terrorism Prevention in Hazardous Materials Transportation Act of 2005" ("Terrorism Prevention Act" or "TPA") (copy previously attached as Plaintiff's Exhibit ("PEx.") 11 to PI Memo, at 2 (*citing* October 24, 2002, FBI alert)). The DHS has also reported that terrorists may seek to use trucks carrying such materials as weapons. *Id.* (*citing* July 30, 2004, DHS advisory).

Moreover, the federal government has specifically found that "hazardous materials transported in commerce potentially may be used as weapons of mass destruction or weapons of convenience." U.S. Department of Transportation ("USDOT"), Research and Special Programs Administration, Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 67 Fed. Reg. 22028, 22029 (May 2, 2002).

After extensive consideration, including public hearings and testimony from a number of federal government witnesses, the Council of the District of Columbia ("Council") concluded that the ongoing threat of terrorism in the vicinity of the Capitol constituted an emergency which "requires an urgent response that recognizes and addresses the unique status of this area in

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as DEx. 1). Moreover, calculations based on CSXT's discovery responses indicate that the District law might require the rerouting of just 2,313 cars annually, which represents just 0.03 % of CSXT's annual traffic, assuming plaintiff could not obtain any permit under the law (in which case that number would be reduced even further). Declaration of David J. Shuman, dated Mar. 14, 2005 ("Shuman Decl.") ¶ 23d (copy attached as DEx. 2). CSXT has offered no explanation for any of these discrepancies.

American politics and history, and the risk of terrorism that results from this status." Terrorism Prevention Act, § 2(2) (February 1, 2005) (copy previously attached as PEx. 3 to PI Memo).

The Council's heightened concern about terrorism in this area is well-founded. According to the 9/11 Commission, the objective of the Al Qaeda pilot at the controls of United Flight 93, which crashed in Shanksville, Pennsylvania on September 11, 2001, despite the heroic efforts of its passengers, was "to crash his airliner into symbols of the American Republic, the Capitol or the White House."[3]

Moreover, there has evidently been no reduction in the threat of an Al Qaeda attack here. On the very day that plaintiff filed suit, "the top half-dozen U.S. national security and intelligence officials [including Porter Goss, the Director of the Central Intelligence Agency, and Robert S. Mueller III, director of the FBI] went to Capitol Hill to talk about the continued determination of terrorists to strike the United States." *See* Dana Priest & Josh White, "War Helps Recruit Terrorists, Hill Told," THE WASHINGTON POST, at A1 (Feb. 17, 2005). As Director Mueller told the Senate Committee on Intelligence, "al-Qa'ida continues to adapt and move forward with its desire to attack the United States using any means at its disposal. Their intent to attack us at home remains—and their resolve to destroy America has never faltered."[4]

Director Mueller also emphasized that "[w]e continue to be concerned that U.S. **transportation systems remain a key target.** The attacks in Madrid last March show the devastation that a simple, low-tech operation can achieve and the resulting impact to the

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[3] Final Report of the National Commission on Terrorist Attacks Upon the United States at 14 (Authorized Ed.).

[4] Testimony of Robert S. Mueller, III, Director, FBI before the Senate Committee on Intelligence of the United States Senate, Feb. 16, 2005, at 3, available at http://www.fbi.gov/congress/congresss05/mueller021605.htm ("Mueller Testimony").

government and economy, which makes this type of attack in the U.S. particularly attractive to al-Qa'ida." Mueller Testimony at 4 (bold-face type in original).[5]

CSXT does not question the Council's commonsense conclusions about the threat of terrorism in the Capitol Exclusion Zone. It does not dispute that a release of ultra-hazardous materials from a CSXT train in the Capitol Exclusion Zone would have the catastrophic effects on life and property predicted by the Council. Instead, ignoring the clear import of these conclusions, CSXT simply wants to continue doing "business-as-usual" and relies on legal principles developed for run-of-the-mill economic cases that bear no relation to the unique circumstances of time, place, and law that are presented here.[6]

There is no contention here that any shipments *cannot* reach their destinations without going through the District of Columbia. To be sure, some reroutes may be required (PI Memo at 17–18), and some of those will almost certainly add some transit time to some shipments. But by the explicit terms of the statute, if a carrier can show that the reroutes are "cost-prohibitive," then the District's Department of Transportation ("DDOT") must permit such shipments through the District. Terrorism Prevention Act, §§ 3(4), 5. CSXT's allegations concerning the severity of the problems it faces must be met with considerable skepticism, as its inconsistent evidence demonstrates.

Norfolk Southern Railway Co. ("NSR"), as *amicus*, blithely asserts that it would refuse to accept any rerouted traffic from CSXT. NSR Memo at 9. But, as discussed in greater detail

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[5] Although the Madrid attacks involved passenger trains, Director Mueller pointedly did not limit his concerns to passenger transportation systems.

[6] In the face of such disturbing factual scenarios, CSXT makes only the tepid assertion that "CSXT appreciates that there are many public policy issues involving the production, use and transport of the commodities covered by the District Act. In this action, CSXT takes no position with respect to those issues." PI Memo at 2.

below, NSR's common-carrier obligations do not let it off the hook so easily, as its own witness conceded. *See* Transcript of Deposition of Joseph C. Osborne, Jr. dated Mar. 4, 2005 ("Osborne Depo."), at 124–25 ("we don't have the option of not handling" certain hazardous products, such as chlorine, because of NSR's "common carrier obligation") (excerpt attached as DEx. 3).

Evidently acting *in loco parentis* for other jurisdictions, CSXT also argues that the District is simply shifting risk from itself to those states and municipalities through which traffic rerouted because of the TPA might travel. This point, also made by the United States here, and by the USDOT before the Surface Transportation Board ("STB"),[7] entirely misconceives the nature of the threat addressed by the Terrorism Prevention Act, as the attached Declaration of David J. Shuman makes clear. *See* Shuman Decl. ¶¶ 14–18. The risk of an *accident* in some other jurisdiction simply cannot be equated with the risk of an *attack* in the Exclusion Zone.[8]

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[7] Comments of the U.S. Department of Transportation, S.T.B. Fin. Dkt. 34662, Feb. 16, 2005 (copy previously provided as PEx. 2 to PI Memo) at 8. Although USDOT was responsible, through the Federal Aviation Administration, for the safety and security of civil aviation before September 11, 2001 (9/11 Commission Report at 14), it was stripped of its homeland security responsibilities when the DHS was created. Notably, neither DHS nor any other federal agency with counterterrorism responsibilities joined DOT in supporting CSXT's position before the STB.

[8] Plaintiff claims that "it is unlikely that detouring hazardous shipments around the District would produce any system-wide improvement in safety or security." PI Memo at 19. The United States also baldly claims that "[t]he risks associated with the transportation of hazardous materials correspond to the amount of time in transit." U.S. Statement of Interest at 8. *Id*. at 9 (the Terrorism Prevention Act "would have the effect of increasing the aggregate risk associated with the transportation of hazardous materials.").

The District avers that these allegations are logically false. At bottom, one plainly cannot equate the risk of *accidents* with the risk of *intentional terrorist acts*—they are different in both degree and magnitude. Plaintiff, like the United States and most of the commenters at the STB, simply ignores the required balancing here: the tremendous gains in safety and security for the residents and visitors of the District in rerouting must be weighed against the minimal administrative and financial burdens of the jurisdictions through which the rerouting may occur which should include, obviously, the minimal increase, if any, in the risk of *accidents* that may happen due

Plaintiff justifiably notes its outstanding safety record, stating that its "accident reporting database" reveals "only one insignificant release of any hazardous material" in the District for the past ten years. Affidavit of John M. Gibson, Jr. ("Gibson Aff."), dated Feb. 16, 2005, at ¶ 12. Measured as a risk, that release must be truly infinitesimal when compared to the millions of railcar miles logged annually by CSXT. But assuming that information is true, as the District and the Court must under summary judgment standards, even a *doubling* of such an insignificant risk (by doubling the miles through rerouting that the hazardous materials cars must travel) would still amount to an insignificant risk of *accident*. As the record shows, even this doubled insignificant risk pales in comparison to the risk of harm caused by an intentional terrorist attack faced by the District here.

CSXT also expresses a fear of "copycat" laws. Plaintiff's Memorandum in Support of its Motion for Summary Judgment ("P.Mem.SJ") at 10. If the District of Columbia can require rerouting of some ultra-hazardous chemicals, CSXT says, then any other community can do the same, and commerce in certain commodities essential to the American economy will "grind to a halt." PI Memo at 2. The suggestion implicit in CSXT's argument—that *every other* jurisdiction through which it passes qualifies as a demonstrated, high-threat terrorist target—is clearly false.

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solely to increased travel times and handling. *See* Shuman Decl. 2 ¶ 25 (increased risk of accident because of TPA rerouting "is small enough to be almost nonexistent").

CSXT is currently voluntarily rerouting some hazardous materials traffic. If "aggregate risk" were thus proportional only to the overall time a rail car is on the tracks, the federal government and CSXT would never have agreed to the rerouting, which clearly *increases* overall route length and handling. But the rerouting obviously greatly *reduces* the risks faced by the District of an intentional terrorist act. CSXT's and the federal government's arguments are directly contradicted by their actions. The Terrorism Prevention Act, as demonstrated by the record, reduces aggregate risk system-wide.

What plaintiff, the United States, and the dozens of railroad and chemical industry commenters in the related STB proceeding studiously avoid addressing is that the District's situation is *unique*: no other urban area, with the possible exception of New York City, faces the same demonstrated risk of terrorist attack. *See infra* at 1–2. The area already has a facility—Reagan National Airport—subject to unique security provisions that recognize the status and special situation of the nation's capitol. *See, e.g.*, 50 Fed. Reg. 7150 at 7153 (Feb. 10, 2005) ("flight restricted zone" centered on Reagan National Airport subject to more stringent security measures).[9]

Moreover, as discussed in greater detail below, and in the attached Declaration of Mr. Shuman (¶¶ 13–18), the "risk" inherent in the transportation of hazardous materials that the federal regulations *have* addressed (such as in the areas of rail car design and track conditions) is the risk of *accident*. CSXT and its industry supporters intentionally ignore the distinction emphasized by the Council between risks involving hazardous material *accidents* (which may occur anywhere those materials are transported), and the risks of *intentional terrorist attacks*

[9] The federal government has also recognized the unique nature of the threat to the Pentagon, directing the rerouting of a local highway, Virginia Route 110. *See* Pentagon Renovation and Construction Project (http://renovation.pentagon.mil /Roads/roads.htm). Telephone inquiries regarding the specific legal authority for such rerouting revealed only general references to appropriations law. *See* Department Of Defense And Emergency Supplemental Appropriations For Recovery From And Response To Terrorist Attacks On The U.S. Act of 2002, 107 P.L. 117, 115 Stat. 2230 (Jan. 10, 2002) and National Defense Authorization Act For FY2002, 107 P.L. 107, 115 Stat. 1012 (Dec. 28, 2001). In the limited time available for research of this issue, however, despite repeated readings of those laws, the District has failed to find specific language authorizing the referenced rerouting, nor has the District found any specific references to the project in other federal sources, such as the Federal Register or the Congressional Record, although the rerouting has been widely reported. *See, e.g.*, Steve Vogel, "Workers Push to Fortify Military Headquarters; World's Largest Reconstruction Keeps Pace," THE WASHINGTON POST, at C1 (Sept. 7, 2003) ("A major commuter thoroughfare, Route 110, is being rerouted away from the Pentagon . . . ."); Associated Press, "Worried Pentagon Closing Child Care Center" (July 15, 2004).

implicating hazardous materials, which, by definition, are more likely to occur near targets of political significance. *See* Shuman Decl. ¶ 15 (risk of terrorist attack moves with location of the Capitol, not with the hazardous material).

The risk that the District seeks to avoid here is the risk of intentional, terrorist attack by the targeting of regular shipments of hazardous materials that pass within blocks of the U.S. Capitol—a risk that federal regulations do not address. Because the District of Columbia is under a *unique* risk of such an attack, the rerouting of the covered materials here to other areas would effectively *eliminate* that risk, not shift it elsewhere. Other jurisdictions do not face the magnitude or type of risk faced by the District here, and could not copy the unique legislation adopted by the District.

CSXT, by voluntarily rerouting some hazardous materials for almost a year, Complaint ¶ 65, has implicitly conceded that the District is under a unique, credible threat of a terrorist attack. The record is barren of any evidence that CSXT (or any other shipper) has rerouted hazardous material traffic around *any other* jurisdiction; that clear implication is that no other place faces the threat of terrorist attack on hazardous material shipments faced by the District.

II. Factual and Procedural Background

A terrorist attack on a train containing hazardous materials in the area of the Capitol would be catastrophic. The Council, in two public hearings, heard testimony that such an attack could cause tens of thousands of deaths and economic impacts of upwards of $5 billion.[10] *See*

[10] Indeed, the Honorable Eleanor Holmes Norton, the District's nonvoting congressional representative, called the risk of terrorist attack on hazardous materials the "single greatest unaddressed security threat to the City." Council Intro. at 1.

Council Intro. *See also* 51 D.C. Reg. 10607 (Nov. 19, 2004) (notice of public hearing); 50 D.C. Reg. 11042 (Dec. 26, 2003) (notice of public hearing).[11]

> Federal agencies have recognized that the security concerns raised by possible terror attacks on hazardous rail shipments are not adequately addressed by rules pertaining to accidental releases. *See, e.g.*, 68 Fed Reg. 14514 (March 25, 2003) (existing regulations "focused on safety, not security" and are insufficient for preventing products from being used "as weapons of opportunity" or as ingredients in "weapons of mass destruction").
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> The terrorism threat facing D.C. residents and workers in the vicinity of the Capitol Exclusion Zone requires a response that recognizes and addresses the unique status of this area in American political life and history, and the terrorism risk that results from this status.

Council Intro. at 3.[12]

The Council heard testimony from Thomas Lockwood, the director of DHS's Office of National Capital Region Coordination (copy of testimony previously attached as PEx. 8 to PI Memo). While Mr. Lockwood discussed generally the "risk analysis" undertaken of the "D.C. Rail Corridor," he did not cite any federal efforts to regulate the rerouting of hazardous materials

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[11] The Council approved the "temporary" version of the TPA, valid for 225 days, by unanimous vote on March 1, 2005. P.Mem.SJ at 10. This version was not passed, contrary to the implications of plaintiff, to avoid Congressional review. *See Atkinson v. D.C. Bd. of Elections and Ethics*, 597 A.2d 863, 865 n.5 (D.C. 1991) (practice of passing temporary legislation was developed to fill a potential "gap" period between emergency legislation and permanent legislation, necessitated by limitations on the ability of the Council to pass successive emergency bills) (*citing, inter alia, United States v. Alston*, 580 A.2d 587, 590–91 (D.C. 1990)).

[12] The United States refers to the referenced federal regulations as "comprehensive." U.S. Statement of Interest at 11. At best, that claim is exaggerated. Even a cursory review of the referenced 10 pages of comments (and only one of actual regulations) reveal that they cannot reasonably be considered comprehensive, as they appear to be little more than a voluntary compliance scheme, requiring shippers only to submit a "security plan" and train their employees. The regulations impose no other specific measures on shippers, allowing them to self-identify security risks and "put into place" self-chosen "appropriate measures" to "address" those risks. 68 Fed. Reg. at 14521.

around high-terrorist-threat areas, nor did he indicate that the District legislation on which he was commenting was preempted by any federal law. *Id.* at 1–2.[13]

While the federal authorities appear to have failed to require mandatory rerouting,[14] they have implicitly recognized that such rerouting is an appropriate response to the terrorism threat. CSX arranged for secret rerouting of some hazardous materials on some of CSX's lines, but only on a voluntary basis. "[W]hen DHS has asked for a specific reason to suspend certain shipments for a specific period of time, the railroads to our knowledge have accommodated that. So there are times then that it is felt to be an appropriate measure given the potential risk that has been described." PEx. 5 to PI Memo, at 11 (Gavalla testimony). *See also* PEx 12 to PI Memo (comments of Councilmember Schwartz) (Feb. 1, 2005):

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[13] Plaintiff also alleges that Mr. Lockwood indicated that DHS had decided to address security without resort to rerouting. PI Memo at 10–11. Plaintiff, however, did not provide any evidence (such as a transcript) for that assertion; Mr. Lockwood's written testimony (PEx. 8 to PI Memo) never makes that proposition.

[14] *See also* DEx. 7 (letter to the Honorable Tom Ridge, then-Secretary of DHS, from Representatives Edward J. Markey, Jim Turner, and Eleanor Holmes Norton, dated October 29, 2004):

> An Ohio-based Al Qaeda operative has already been arrested and pled guilty to plotting to collapse a bridge in New York City or derail a train in DC. [W]hile DHS has no plans to require the permanent re-routing of any shipments of extremely hazardous materials around Washington, DC, CSX has been voluntarily re-routing such shipments for more than 7 months while continuing to experience growth in its revenues.
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> In particular, when your staff was questioned on October 14, 2004 regarding its analysis of the economic and other considerations associated with re-routing, they were unable to provide a response and had no idea whether such an analysis had been conducted by anyone at the Department. This left the impression that rather than conducting a true vulnerability assessment that considered all possible security solutions, the Department instead directed the staff to consider all options *except* re-routing as it developed its security plan.

> [We] were told that re-routing of poisonous inhalation gases referred to in the Bill has occurred since last March, nearly a year ago. And a *Washington Post* article, dated November 10, 2004, it stated that the Department of Homeland Security disclosed last month that CSX has diverted shipments of the most dangerous chemicals and explosives since the March 11th commuter train bombings in Madrid. *The New York Times* even stated in a January 9, 2005, article, the Government officials said that security officials secretly persuaded one railroad to re-route toxic shipments that had routinely passed through Washington. And that's the only company that sends any trains through Washington. Granted, CSX is doing the re-routing voluntarily, and talking with the Department of Homeland Security recently, I asked what would happen if CSX stopped their voluntary re-routing. I was told that CSX had to notify the Transportation Security Administration, which is part of the Department of Homeland Security, if they stopped re-routing the hazardous cargo and that TSA would then order the re-routing of such materials. I then asked why TSA, that's the Transportation Security Administration, wouldn't simply go ahead and order the re-routing. In response, the Department of Homeland Security representative said, "Why would you order something that has already been done?" The same is true here.

Id. at 5. *Cf.* Complaint ¶ 65 (voluntary rerouting only on North-South line).

The Council heard testimony that a report from the Homeland Security Council estimated that an attack on a chlorine tank car could cause 17,500 fatalities, 10,000 severe injuries, and 100,000 hospitalizations. DEx. 4 (testimony of Rick Hind, Legislative Director, Greenpeace Toxics Campaign, Nov. 22, 2004). *See also* DEx. 5 (testimony of Dr. Jay Boris, U.S. Naval Research Laboratory) at 8 ("[P]lausible accidents or terrorist attacks in an urban environment can put 100,000 people or more at risk in a 15 to 30-minute time span. During this interval several square miles of city can become lethally exposed and people can die at the rate of 100 per second.").

The Council also heard testimony on risk assessment, indicating that routing hazardous materials shipments away from a vulnerable, highly populated area such as the District would be less costly than preparing for, or sustaining the actual costs of, a terror attack on such shipments:

Id. at 1–2 (emphasis in original) (*citing* http://www.csx.com/share/csx/investor/press_ release/pressrel3q2004.pdf).

> A major release accident or terrorist attack occurring in the midst of a densely populated area will have much graver consequences than if the same attack were to occur in a less populated area. In fact, it can be argued that re-routing tank cars to avoid a high-visibility location like Washington, D.C. would eliminate one of the major incentives for a terrorist attack.

DEx. 6 at 1–2 (testimony of Professor Theodore Glickman, Nov. 22, 2004).

The narrowly crafted law here only affects a subset of hazardous materials already shipped, and only certain large quantities of those materials. "[P]robably representing less than 5% of the conventional hazardous materials that move regularly through Washington." Council Intro. at 7. Moreover, the law does not unconditionally prohibit the transportation of the referenced materials through the zone, but authorizes a permit for such transportation if the carrier can demonstrate that rerouting would be "cost-prohibitive;" *i.e.*, there is "no practical alternative route." TPA § 3. Additionally, emergencies elsewhere in the transportation system can allow temporary, unpermitted shipments through the zone. *Id*. §§ 3–4.

Plaintiff filed the instant Complaint on February 16, 2005, and filed its Motion for Preliminary Injunction on February 22, 2005. Plaintiff requests emergency injunctive relief because the Terrorism Prevention Act allegedly "causes immediate and irreparable injury to CSXT, its shippers and their customers." PI Motion at 2.

Specifically, plaintiff alleges that the Terrorism Prevention Act violates the Commerce Clause, and is preempted by the Federal Rail Safety Act ("FRSA"), *codified as amended at* 49 U.S.C. §§ 20101 *et seq*. (2005), the Hazardous Materials Transportation Act, *codified as amended at* 49 U.S.C. §§ 5101 *et seq*. (2005), and the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), *codified as amended at* 49 U.S.C. §§ 701 *et seq*. (2005). PI Memo at 5. Finally, plaintiff alleges that the District law is *ultra vires* (per the District's own Home Rule Act). *Id*.

Plaintiff filed its Motion for Summary Judgment on March 8, 2005.

Plaintiff's allegations each fail as a matter of law; plaintiff is not entitled to emergency injunctive relief nor to summary judgment.

III. Argument

In the face of the compelling facts before the Council, CSXT, understandably, does not challenge the law on the purposes for which it was enacted, but presses its economic, interstate-commerce arguments in a more prosaic fashion—that the Terrorism Prevention Act "will impose serious operational burdens on CSXT . . . ." PI Memo at 3. CSXT's parochialism cannot trump the District's fundamental right and obligation here to protect its citizens.

In order to obtain a preliminary injunction, plaintiff must satisfy *each* prong of the following four-part test: (1) there is a substantial likelihood of success on the merits; (2) plaintiff will suffer irreparable harm should the relief be denied; (3) an injunction would not substantially injure other interested parties; and (4) the public interest will be furthered by the issuance of the requested order. *Mova Pharmaceuticals Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (*quoting CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)).

Because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly. *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) ("A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking relief, by a clear showing, carries the burden of persuasion.") (*citing Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (a preliminary injunction is "an extraordinary and drastic remedy")).

While a strong showing on one of the four factors may make up for a weaker showing on another, *Serono Labs. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998), a particularly weak

showing on one factor may be more than the other factors can "compensate" for. *Taylor v. RTC*, 56 F.3d 1497, 1506 (D.C. Cir. 1995), *amended on other grounds on reh'g.*, 66 F.3d 1226 (D.C. Cir. 1995).

Plaintiff here utterly fails to show that it faces the imminent threat of irreparable harm necessary for the grant of emergency injunctive relief.

A. Plaintiff Will Not Suffer Irreparable Harm.

At a minimum, a plaintiff seeking emergency injunctive relief must make a threshold showing of irreparable injury. *CityFed*, 58 F.3d at 747 (*citing Sea Containers Ltd. v. Stena AB*, 890 F.2d 1205, 1208 (D.C. Cir. 1989) (preliminary injunction properly denied "where moving party may have been 'likely to succeed' but did not carry burden of showing irreparable harm, since 'the basis of injunctive relief in the federal courts has always been irreparable harm.'") (*quoting Sampson v. Murray*, 415 U.S. 61, 88 (1974) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959))).

"Irreparable" is a term of art in this context; it means damages that cannot be remedied financially. But the *only* injuries feared by plaintiff itself are entirely financial in nature—the "burden" of rerouting trains, the costs of additional handling and "substantially longer routes." PI Memo at 5–6. Plaintiff's feared injuries are supported by minimal, inconsistent evidence, and even that evidence shows that the impact on CSXT would be minimal, entirely financial, or measurable in financial terms.[15] Plaintiff has failed to meet its burden.

[15] Plaintiff claims that the rerouting, even if permanent, "would significantly decrease the capacity and flexibility" of its rail network. PI Memo at 19. But plaintiff's assertion here fails to acknowledge the obvious—that no matter the initial disruptions caused by rerouting, the costs and difficulties associated with it would likely eventually "amortize," leaving CSXT

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985), sets forth the guiding principles for determining whether irreparable harm exists: (1) the injury must be both *certain* and *great*, not something merely feared as likely to occur at some indefinite time; (2) the injury must be of such imminence that there is a "clear and present" need for relief to prevent it; and (3) economic loss is insufficient to constitute irreparable harm unless the plaintiff's very existence is threatened. *See also Sampson*, 415 U.S. at 88–90.

The factual support presented by plaintiffs fails to meet this test, and the limited discovery conducted by the District here effectively refutes even that support.

The expert affidavit provided by plaintiff vaguely asserts "serious long term impacts" on its network, derived from "computer modeling," if it was required to reroute by the TPA, but that primary allegation was undercut by subsequent discovery. The affiant admitted that it would take only three to four weeks to adapt their computers to handle any rerouting. Gibson Depo. pp. 55–57. More importantly, Mr. Gibson admitted that CSXT has not done any type of cost study as to the financial impact of either the voluntary rerouting or any rerouting that might occur under the TPA. *Id*. pp. 16–17. Additionally, the computer models used by CSXT in attempting to predict the "impact" of the TPA did not incorporate any rail lines owned by other companies, nor did CSXT take into account the relative safety of routes for certain shipments. *Id*. pp. 42–44.

Plaintiff's own evidence reveals the minimal impact of any required rerouting, which would amount to just 0.16% of its total national rail traffic, or just 2.3% of its total national hazardous-material traffic. *See* Complaint ¶¶ 7, 67.[16] *See also* Gibson Depo. at 58–59 (since

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with just as flexible a system as it had before, despite losing the current "flexibility" of being able to route hazardous materials through the District.

[16] *But cf.* Shuman Decl. ¶ 23d (at a maximum, only 0.03 % of CSXT's traffic might require rerouting).

May, 2004, start of voluntary reroute, only ten cars covered under TPA have been shipped on CSXT's north-south line). Even more egregiously, plaintiff submitted an affidavit purporting to show "specific examples" of the "decreased efficiency" of CSXT's system as a result of the Terrorism Prevention Act. Gibson Aff. ¶ 34. But subsequent discovery revealed that those "effects" are not a feared *consequence* of the TPA, but what CSXT is *already* doing to effectuate its voluntary reroute. Gibson Depo. at 137–38 ("Q. So both of these [from paragraph 34] are actual examples, to the best of your knowledge, of voluntary rerouting? A. Yes."). The clear import being that CSXT has failed to carry its burden that the "effects" of the TPA will be as severe as it broadly claims.

Although CSXT failed to do a financial analysis, Mr. Gibson estimated that a full rerouting would impose, at most, "direct costs" to CSXT of $2 million to $3 million annually. *Id*. at 21–23. But that assumption was based on rerouting over its *own* lines, and did not take into account any possible efficiencies gained by using other lines, nor did CSXT ever discuss with its customers the possibility of rerouting onto NSR. *Id*. at 79. CSXT, moreover, is not even aware whether or not it has increased its rates to shippers to cover the costs incurred by the voluntary rerouting. *Id*. at 139. Discovery also revealed that CSXT had never discussed with NSR the possibility of using NSR's lines, *id*. at 61, so plaintiff's speculative claims of damages must be rejected.

In the end, CSXT admitted that, even assuming that rerouting under the TPA would be required to the full extent claimed by plaintiff, the additional miles required on average per rerouted car would amount to less than 200 miles. *Id*. at 72. CSXT also admitted that it had plans to increase its existing network capacity in the area, but that it has never studied whether those plans might mitigate the "damages" feared by any TPA rerouting. *Id*. pp. 116–118.

Plaintiff has failed to provide the threshold evidentiary support necessary to justify emergency injunctive relief. *See* Shuman Decl. ¶¶ 9–10.

NSR's factual support deserves even less consideration. NSR asserts that it will suffer "irreparable harm" without emergency injunctive relief, apparently assuming that if CSXT is required to reroute traffic, it would do so onto NSR track. NSR Memo. at 8. But NSR's understanding of the challenged legislation itself (not to mention the feared consequences) is suspect. Its own witness admitted that he had not read the Terrorism Prevention Act, believed it applied only to rail traffic, and did not know what materials it covered. Osborne Depo. pp. 24–26. But NSR's position not to take any rerouted hazardous material traffic was taken as a matter of *policy* for litigation purposes, not for any purported "emergency." NSR, like CSXT, performed no analysis of potential cost impacts of rerouting, *id*. at 52, nor did it even do any computer modeling to determine the impacts on NSR's operations, *id*. at 61, apparently basing its position mainly on the mistaken assumption that other jurisdictions will pass similar legislation. *See id*. at 65, 96 ("probability that other municipalities are going to do the same thing."). As the District has shown, however, it faces a unique threat of terrorist attacks that are not faced by any other surrounding jurisdiction.

Moreover, NSR has not done any fiscal analysis regarding additional revenue that it might generate as a result of any rerouting from CSX, *id*. at 95, which should not be difficult to calculate, as NSR admitted that it currently, regularly receives hazardous materials traffic from CSXT (at Philadelphia). *Id*. at 92. NSR's assertion that it would not consent to CSXT's rerouted traffic must be viewed with suspicion, considering that NSR's witness was not aware of NSR *ever* refusing to enter an interchange agreement, *id*. at 115–16, nor was he aware of any instances where NSR refused shipments from other carriers based on "predictions about the effects on the

safety of [NSR]'s lines or the communities on those lines[.]" *Id*. at 133. The District effectively refutes NSR's common-carrier arguments in greater detail below. *See also* Shuman Decl. ¶¶ 27–30.

CSXT also argues, albeit implicitly, that a threatened constitutional/federal injury creates irreparable injury warranting emergency injunctive relief. Plaintiff is incorrect.[17]

Plaintiff has not—and cannot—cite precedent from this Circuit (or anywhere else) which applies the "*per se* irreparable harm" theory they advance. Plaintiff's feared injuries are chiefly economic in nature and, even if those injuries and the constitutional allegations were proven, do not entitle plaintiff to emergency injunctive relief. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992) (the prospect of an "imminent" state civil or criminal enforcement suit of an unconstitutional law may comprise the necessary irreparable injury to qualify for emergency injunctive relief).

The law is clear that economic loss is *insufficient* to constitute irreparable harm unless the movant's very existence is threatened. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Here, plaintiff has failed to show irreparable harm because it has not alleged nor offered proof that the very existence of its business will be threatened.

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[17] There is considerable persuasive precedent directly contrary to plaintiffs' implicit argument. *See Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000) (*en banc*) (rejecting plaintiff's contention that "violation of constitutional rights always constitutes irreparable harm."); *Morton v. Beyer*, 822 F.2d 364, 372 (3rd Cir. 1987) (in context of preliminary injunction, affirming district court's finding that while plaintiff was likely to succeed on due process claim, there was no basis for a finding of irreparable injury); *Public Service Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (alleged denial of due process, without more, does not "automatically trigger" a finding of irreparable injury). *Cf. Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (pre-exercise deprivation of First Amendment rights, for even a short period of time, may constitute irreparable injury).

That there can be no irreparable harm from financial losses, even if *substantial*, has been firmly established by the Supreme Court, the D.C. Circuit, and nearly every federal court of appeals. That overwhelming precedent holds that loss of income and its attendant financial consequences do not, *as a matter of law*, constitute irreparable harm. *Sampson v. Murray,* 415 U.S. at 90–91; *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (1958).

The sole, noncontrolling case plaintiff cites for the proposition that its feared administrative burdens are "irreparable," *Long Island R. Co. v. Int'l Assn. of Machinists ("IAM")*, 874 F.2d 901 (2nd Cir. 1989), is easily distinguishable on both the law and the facts.

In that case, several railroads sought an injunction to prevent a strike against them, because they feared that several unions would honor picket lines established by IAM at the railroads. *Id.* at 904. The railroads claimed that, if struck, they would "be forced to cease operations." *Id*. at 905. The 2nd Circuit affirmed the trial court's grant of a preliminary injunction under the authority of the Railway Labor Act ("RLA"), which prohibited such "sympathy" strikes prior to exhaustion of RLA procedures. *Id*. at 908. This Circuit has reached the same conclusion. *See Nat'l Railroad Passenger Corp. v. Transport Workers Union of America*, 373 F.3d 121, 127 (D.C. Cir. 2004).

Thus, *IAM* is clearly *limited* to those cases involving strikes by RLA-covered unions, which threaten to effectively *shut down* railroads. Consequently, mere "disruption" of operations (as alleged by CSXT here) is insufficient under *IAM* to qualify for emergency injunctive relief. The 2nd Circuit in that case found that irreparable injury was sufficiently alleged because the railroads claimed that the threatened strikes would force them to stop operating. *See id*. at 911 (finding that

"the immediate and irreparable harm to the Railroads and the public resulting from a general cessation in railroad service surpasses that of the [harm to the] Unions.").[18]

In contrast here, CSXT has not alleged that it might be required to *cease operations* if the Terrorism Prevention Act is enforced, merely that it would incur additional, unquantified administrative and possibly financial burdens, assuming it could not obtain a permit. *See* PI Memo at 6. That showing is insufficient—as a matter of law—to justify emergency injunctive relief here.

B. Plaintiff Fails to Establish A Substantial Likelihood of Success On the Merits.

1. *Plaintiff's Facial Challenge Cannot Succeed.*

Because the law has not yet been enforced, plaintiff here brings a facial challenge to the Terrorism Prevention Act. A facial challenge to a legislative act is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). *See also Steffan v. Perry,* 41 F.3d 677, 693 (1994) (*en banc*); *Chemical Waste Management, Inc. v. U.S. Environmental Protection Agency*, 56 F.3d 1434, 1437 (D.C. Cir. 1995).

[18] The 2nd Circuit also noted that the unions could *not* be enjoined from enlisting the support of unions *not* covered by the RLA. *Id*. at n.4 (*citing Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 407–409 (1976) (court has *no jurisdiction* to enjoin sympathy strike by non-RLA union pending outcome of arbitration under collective bargaining agreement).

Legislative enactments are presumed to be constitutional and the burden of establishing invalidity is on the challenger. *Pharmaceutical Research & Manufacturers of Am. v. Walsh*, 538 U.S. 644, 661 (2003) (*citing Davies Warehouse v. Bowles*, 312 U.S. 144, 153 (1944)).

Plaintiff's fears are speculative at best, as is its interpretation of the Terrorism Prevention Act. *See Shell Oil v. Iowa Dept. of Revenue*, 488 U.S. 19, 29 (1988) ("the fears and doubts of the opposition are no authoritative guide to the construction of legislation.") (citations and quotation marks omitted); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964) (The Supreme Court has often "cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.").

2. *The Terrorism Prevention Act Does Not Violate the Commerce Clause.*

Plaintiff has clearly "misconstrued the role of" the Commerce Clause here. *SEIU, Local 82 v. District of Columbia*, 608 F.Supp. 1434, 1437 (D.D.C. 1985). This is not a quotidian dispute between railroads or between a railroad and a customer. This matter is nothing less than an attempt to stop the District's exercise of its broad police powers to protect its citizens from an unprecedented and unique threat.

In the typical case in which local laws have been struck down as violating the Commerce Clause, the law is usually a protectionist measure designed to insulate local industry from out-of-state competition. *See, e.g., Oregon Waste Sys., Inc. v. Dept. of Environmental Quality*, 511 U.S. 93 (1994) (state law imposed higher disposal fee on out-of-state waste). The challenged legislation is clearly not, by its terms, simple economic protectionism. CSXT cannot seriously contend that the legislation favors intra-District economic interests over out-of-state ones; neither

the *source* nor the *destination* of the materials shipped here are implicated by the law—it makes no differentiation between interstate and intra-District commerce in terms of origin or ultimate destination of the hazardous materials, or for any other reason. The legislation has one and only one purpose—to protect the citizens of the District from the risk of terrorist attack; any "burdens" CSXT may complain of are no more than incidental.

The Supreme Court has noted that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City of Phila. v. New Jersey*, 437 U.S. 617, 623–24 (1978).

Plaintiff's feared injuries are mainly financial in nature. As the First Circuit noted in *PhRMA v. Concannon*, 249 F.3d 66, 82 (1st Cir. 2001), "simply because the manufacturers' profits might be negatively affected by [the state law] does not necessarily mean that [the law] is regulating those profits."[19] That court also noted that "the fact that a law may have 'devastating economic consequences' on a particular interstate firm is not sufficient to rise to a Commerce Clause burden." *Id*. at 84 (*quoting Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 f.3d 813, 826 (3rd Cir. 1994)). *See also Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127–28 (1978) (Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.").

Plaintiff makes the bald assertion that "[p]rotectionism is protectionism." PI Memo at 22. Plaintiff has cited no case extending its "*per se*" argument as broadly as it suggests. The Second Circuit, over 20 years ago, upheld New York City's regulations requiring the rerouting of hazardous-gas trucks around the city "if no practical alternative route" exists, noting "[t]he New

[19] The Supreme Court subsequently upheld the First Circuit's Commerce Clause analysis. *PhRMA*, 538 U.S. at 669–70.

York regulations plainly do not have local economic protectionism as their objective; [they] are directed at a legitimate local concern for public safety . . . . They apply even-handedly both to intrastate and interstate commerce in hazardous gases." *Nat'l Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270, 271–273 (2nd Cir. 1982).

The TPA compares favorably to the New York City regulations. Plaintiff also quotes the Supreme Court, in an even older case, as saying that the Commerce Clause will protect States "from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all." PI Memo at 22 (*quoting City of Phila.*, 437 U.S. at 629). The District asserts that the "problem" here—the risk of terrorist attack—is most assuredly *not* "shared by all;" it falls uniquely on the District, to the exclusion of the surrounding region, and to the exclusion of any other jurisdictions through which plaintiff's lines may pass, with the possible exception of New York City.[20]

Thus, if a local law is not simple economic protectionism, courts use the balancing test of *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), to analyze the law. If a statute regulates *evenhandedly* and has only *incidental effects* on interstate commerce, a court must balance the alleged *burden* on interstate commerce against the putative local *benefit*. *Id*. at 142 (citations omitted) ("the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved").

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[20] Plaintiff never explicitly claims that rerouted hazardous materials will be required to go through New York City itself, noting vaguely only that rerouted traffic may have to pass "through northern New Jersey (the New York City metropolitan area) . . . ." Gibson Aff. at ¶ 33. *See also* Gibson Depo. at 126 (witness does not know how many cars would have to be rerouted through "northern New Jersey and the New York City metropolitan area"). In fact, an examination of Exhibit A to the Gibson Affidavit (CSXT's System Map) apparently reveals that CSXT does not have any of its own lines through New York City proper. One could conclude that the haphazard inclusion of New York City here is a transparent attempt to diminish the acknowledged uniqueness of the District as a terrorism target.

"[S]tate safety regulations are accorded particular deference in Commerce Clause analysis." *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984) (*citing South Carolina State Highway Dep't v. Barnwell Bros., Inc*., 303 U.S. 177, 189 (1938) and *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443 (1978)).[21]

Here, the legislation will have undeniable security and safety benefits. In such circumstances, further Commerce Clause analysis is unnecessary:

> [F]ive Justices have recently agreed that statutes based on nonillusory safety benefits are not subject to the dormant Commerce Clause balancing test. See [*Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 681 n.1 (1981)] (Brennan, J., joined by Marshall, J., concurring in the judgment) ("in the field of safety . . . the role of the courts is not to balance asserted burdens against intended benefits," but rather "once the court has established that the intended safety benefit is not illusory, insubstantial, or nonexistent, it must defer to the State's lawmakers on the appropriate balance to be struck against other interests"); *id*. at 692 n. 4 (Rehnquist, J., joined by Burger C.J., and Stewart, J., dissenting) ("courts in Commerce Clause cases do not sit to weigh safety benefits against burdens on commerce when the safety benefits are not illusory"); see also *id*. at 670 (opinion of Powell, J.) (noting "strong presumption of validity" that attaches to safety regulations).

Electrolert Corp., 737 F.2d at 113.

The benefits of the law here are clearly "not illusory," and therefore the legislation should not be subjected even to the *Pike* balancing test. *Id*. ("In these circumstances we need not perform any fine balancing tests or inquire closely into the validity of the local government's reasonable factual assumption. Having satisfied ourselves that the local government's safety rationale is not "illusory" or "nonexistent," our inquiry is at an end."). *See also Nat'l Tank Truck*, 677 F.2d at 273 ("Cases striking down nondiscriminatory state safety regulations for disproportionate burdens on interstate commerce are exceptional.").

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[21] In *Electrolert*, the D.C. Circuit *upheld* a District-wide ban on the possession or use of radar detectors, rejecting a manufacturer's Commerce Clause arguments.

The benefits of the law could hardly be clearer—it protects the most attractive target for terrorist attacks in the country. On the current record, the added cost and delay associated with routing around the Capitol Exclusion Zone is not disproportionate when balanced against the tremendous gains in public safety achieved by avoiding a potentially catastrophic terrorist attack in a densely populated area that has already been, and continues to be, a high-risk terrorist target. *See Nat'l Tank Truck*, 677 F.2d at 274 (costs and delay of rerouting tank truck shipments of hazardous gas around New York City "not unconstitutionally disproportionate when balanced against the public interest in avoiding a catastrophic accident in a densely populated urban area").

> In sum, the burden of the [local regulation] on interstate commerce has not been shown to be excessive in relation to the benefits. Congress has great latitude to order preemption, and calibrate it with precision, based on a legislative judgment that local regulation threatens interstate commerce. The dormant Commerce Clause, by contrast, is a fairly blunt instrument; and absent discrimination, courts may reasonably insist on a fairly clear showing of undue burden before holding unconstitutional a traditional example of local regulation.

New Hampshire Motor Transport Assn. v. Plaistow, 67 F.3d 326, 333 (1st Cir. 1995), *cert. denied* 517 U.S. 1120 (1996).

It is clear that the Terrorism Prevention Act does not have an impermissible burden on interstate commerce. At the very least, CSXT has made no serious attempt to establish such a burden. Plaintiff confuses the burden on it with the burden on interstate commerce. Plaintiff's Commerce Clause challenge must fail.

3. *The Terrorism Prevention Act is Not Preempted.*

There is a strong presumption *against* preemption, which "start[s] with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485

(1996) (internal quotation marks and citation omitted); *Geier v. American Honda Motor Co., Inc.*, 166 F.3d 1236, 1237 (D.C. Cir. 1999) (historic police powers, entitled to presumption against preemption, include the protection of citizens' health and safety), *affirmed*, 529 U.S. 861 (2000).[22]

Indeed, "[p]reemption analysis begins with the 'presumption that Congress does not intend to supplant state law.'" *AGG Enterprises v. Washington County*, 281 F.3d 1324, 1327 (9th Cir. 2002). Where federal and state or local enactments overlap in their effects on non-

[22] Plaintiff asserts that this presumption against preemption does not apply in an area "where there has been a history of significant federal presence." P.Mem.SJ at 13 (*quoting United States v. Locke*, 529 U.S. 89, 108 (2001). Plaintiff maintains that *Locke* is indistinguishable, but plaintiff is incorrect. *Locke* involved a challenge to Washington state regulations governing oil tanker operations and design, enacted after the supertanker Exxon Valdez ran aground in Prince William Sound, Alaska, causing the largest oil spill in American history. *Id*. at 94. The Supreme Court noted, preliminarily, that the "intricate complex of international treaties and maritime agreements" indicate that Congress has "demanded national uniformity regarding maritime commerce." *Id*. at 103 (*citing Ray v. Atlantic Richfield*, 435 U.S. 151, 166 (1978)). Here, in contrast, while one of the statutes that plaintiff asserts preempts the TPA (the HMTA) does in fact mention a desire that safety and security regulation for railroads be "nationally uniform to the extent practicable[,]" 49 U.S.C. § 20106, the *very next sentence* of that statute details how States (which includes the District) may enact their own laws and *avoid* federal preemption. *Cf. Holland v. Nat'l Mining Assn.*, 309 F.3d 808, 818 (D.C. Cir. 2002) (agency's preference for "uniform administration" of a statute may be wise, "but it is not the type of decision that deserves [*Chevron*] deference.") (citation omitted).

Even if the presumption against preemption does not apply, the Supreme Court in *Locke* said it must still determine whether the Washington state laws were "consistent with the federal regulatory structure" in light of that scheme's stated objective of national uniformity. *Locke*, 529 U.S. at 108. Here, as discussed in greater detail *infra*, the Terrorism Prevention Act is fully "consistent" with the HMTA and the other federal statutes cited by plaintiff. Finally, the *Locke* Court noted that the *Ray* Court, under longstanding "field" preemption analysis, held that Washington State's regulations were preempted because "Congress . . . mandated federal rules on the subjects or matters there specified, demanding uniformity." *Id*. at 110 (*citing Ray*, 435 U.S. at 168). The *Locke* Court noted that, to determine the scope of field preemption, it is "useful to consider the type of regulations the [federal agency] has actually promulgated under the [federal statute], as well as the [statute]'s list of specific types of regulations that must be included." *Locke*, 529 U.S. at 112. As the District details below, Congress has not mandated federal rules on the subject covered by the TPA, nor is there any statute mandating any "specific types of regulations" that must be promulgated by federal agencies. As noted, the HMTA itself explicitly authorizes the District to do what it has done. *Locke* is thus readily distinguishable.

governmental activities, the proper judicial approach is to reconcile the operation of both statutory schemes rather than hold one completely ineffectual. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978) (Supreme Court "generally reluctant to infer preemption" and it would be "particularly inappropriate to do so in this case because the basic purposes of the state statute and the [federal act] are similar.").

Federal courts continue to exercise this reluctance in the regulation of railroads. In *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the court noted the presumption against preemption recognized by the Supreme Court, and emphasized that the Senate Report on the final form of the bill that became the ICCTA stated that the exclusivity in the legislation "is limited to remedies with respect to rail regulation—not State and Federal law generally . . because they do not generally collide with the scheme of *economic regulation* (and deregulation) of rail transportation," thus identifying a clear limit on the use of the exemption provided in the ICCTA. *Id*. at 1338 (emphasis added). Here, as noted, the issue is not the "economic regulation" of CSXT, but the safety of hundreds of thousands of the District's residents and visitors.

Federal preemption can be express or implied. *Armstrong v. Accrediting Council for Continuing Education and Training, Inc.*, 168 F.3d 1362, 1369 (D.C. Cir. 1999) (*citing Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516–17 (1992) (express preemption if federal statute contains explicit preemption language)).

Implied preemption may be further divided into two subcategories. *Armstrong*, 168 F.3d at 1369. "Field preemption" may be found where the system of federal regulation is "sufficiently comprehensive" to support the inference that Congress intended for the federal scheme to occupy the field exclusively. *Id*. (*quoting California Fed. Savings & Loan v. Guerra*, 479 U.S. 272, 281

(1987)). *See also Fidelity Fed. Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). "Conflict preemption" occurs to the extent a non-federal law actually conflicts with federal law, or where non-federal law is an "obstacle" to the execution of federal law. *Armstrong*, 178 F.3d at 1369; *see also, e.g., Geier*, 529 U.S. at 873–74. Conflict preemption requires "identification of 'actual conflict,' and not on an express statement of pre-emptive intent." *Id*. at 884 (citations omitted).[23]

Plaintiff claims that the Terrorism Prevention Act is expressly preempted by federal law. *See* Complaint ¶¶ 85, 97, 105. Plaintiff is incorrect.

If the federal statute in question contains an explicit preemption clause, courts "must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–63 (2002) (unanimous decision) (*quoting Easterwood*, 507 U.S. at 664). Moreover, if a statute is ambiguous, "the presumption against pre-emption counsels *against* finding express preemption when the purpose of Congress is not clear from the statute's language." *Geier*, 166 F.3d at 1241. Here, not only does each of the federal provisions cited by plaintiff fail to expressly preempt the Terrorism Prevention Act, each statute explicitly defines situations in which non-federal authorities may act.

In the aftermath of 9/11, Congress created the Transportation Security Administration ("TSA") within the USDOT. *See* Aviation and Transportation Security Act, 107 P.L. 71, 115

[23] Plaintiff and the United States, *cf.* n. 12, *infra*, and PI Memo at 29, similarly fail to recognize that "comprehensiveness" for preemption purposes is not measured by the number of pages devoted to regulations, but by whether the federal regulation "substantially subsumes" the subject matter. *CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993). As the District shows below, no federal regulation "substantially subsumes" the subject of the Terrorism Prevention Act.

Stat. 597 (Nov. 19, 2001). Subsequently, the TSA was transferred to the new DHS. *See* Homeland Security Act of 2002, 107 P.L. 296, 116 Stat. 2135 (Nov. 25, 2002).

CSXT concedes that TSA's priority has been elsewhere: "TSA has been active in the aviation and commercial trucking industries. [T]SA has not to date imposed additional requirements on the rail industry." *See* Statement of CSX Transportation, Inc., before the Council of the District of Columbia Committee on Public Works and the Environment, at 6 (Jan. 23, 2004).

Nothing the federal government has done, to date, explicitly preempts the Terrorism Prevention Act. Plaintiff materially overstates the federal efforts here. For example, plaintiff states that the TSA last year undertook the "D.C. Rail Corridor Project," which CSXT claims was a "comprehensive vulnerability assessment of CSXT's I-95 line through the District." PI Memo at 14. This is incorrect; CSXT's facilities were not studied exclusively. The DHS testified before the Council that the D.C. Rail Corridor Project was a "pilot project" to study and potentially mitigate the risks presented by "the movement of bulk hazardous materials" on all of the approximately 42 miles of railroad track and facilities within the Beltway. PEx. 8 at 1 (testimony of Thomas J. Lockwood).

Even more troubling than this exaggeration, plaintiff then concludes that, as a result of this study, the federal government "has determined that hazardous materials, including the Banned Materials, may be transported by rail in interstate commerce (including through the District)[,]" thereby implying that the federal agencies have explicitly (or even implicitly) disapproved the Terrorism Prevention Act. *See* PI Memo at 14. This too, is incorrect; plaintiff is

improperly trying to convert *inaction* on the part of the federal government into a positive prohibition on the District's law.[24]

To date, there has been no federal direction—from any agency—that the District may not act as it has.[25]

a. Chevron Deference

Notwithstanding this lack of specific federal action, plaintiff maintains that the views of the DHS and USDOT regarding preemption "are entitled to great weight." P.Mem.SJ at 11. Plaintiff does not discuss the well-known limits of *Chevron* deference, or how they are implicated here.

When reviewing a federal agency's interpretation of a statute, courts first ask "whether Congress has directly spoken to the precise question at issue." *Public Citizen, Inc. v. HHS*, 332

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[24] Similarly, plaintiff falsely claims that the Chief of the U.S. Capitol Police, and the Capitol Police Board, "are satisfied" with CSXT's arrangements regarding hazardous material transportation in the District. P.Mem.SJ at 8. But a review of the transcript offered as proof of that statement reveals that Chief Gainer was not so explicit. *See* PEx. 4 to P.Mem.SJ at 1. The seemingly supportive statements such as "no need for the [District's] legislation" and "satisfied with precautions [CSXT] has taken" were made by the radio reporters, *not* the federal official.

[25] *See, generally, Atlantic Coast Line Railroad Co. v. Georgia*, 234 U.S. 280, 291–94 (1914):

> [I]n the absence of legislation by Congress, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce.
>
> * * *
>
> The most that can be said is that inquiries have been made, but that Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken.

Id. (citations omitted).

F.3d 654, 659 (D.C. Cir. 2003) (*quoting Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842 (1984)). If the statute is silent or ambiguous, however, courts will defer to an agency's interpretation only if it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

However, plaintiff fails to point out that while *Chevron* deference is not limited to regulations deriving from notice-and-comment rulemaking, "not all statutory interpretations by agencies qualify for the level of deference afforded by [*Chevron*'s second] step." *Public Citizen*, 332 F.3d at 659–60 (*citing United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001)). *See also, e.g., AFGE v. Veneman*, 284 F.3d 125, 129 (D.C. Cir. 2002) ("opinion letters, policy statements, agency manuals, and enforcement guidelines" are the types of agency decisions "undeserving of *Chevron* deference.").

The key factor, according to case law, appears to be whether the agency has explained its course of action. *See Public Citizen*, 332 F.3d at 661 (because agency manual "contains no reasoning that we can evaluate for its reasonableness, the high level of deference contemplated in *Chevron*'s second step is simply inapplicable.") (footnote omitted).

Here, the record contains little indication of DHS's and USDOT's reasoning on preemption outside of the United States' Statement of Interest, which appears to be a parroting of USDOT's (and the railroad industry's) position before the STB.[26] As such, those agencies'

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[26] While there is arguably some "reasoning" in the "security plan" rulemaking, that discussion similarly appears to be a regurgitation of industry comments. *See* 68 Fed. Reg. at 14519. The USDOT concludes there that non-federal jurisdictions "should not be permitted to impose hazardous materials transportation security requirements that differ from, or are in addition to, those adopted in this final rule." *Id*.; U.S. Statement of Interest at 12. But that seemingly broad preemption directive is contradicted by express language further down the page explicitly authorizing non-federal law. *See* n.40, *infra*. Moreover, the USDOT (and the United States here) note that "[c]ommenters who addressed this issue unanimously agree" with the preemption conclusion. However, that asserted unanimity means only that the agency was not privy to (and therefore did not seriously consider) legitimate non-preemption arguments similar

thoughts on preemption are not entitled to the full extent of *Chevron* deference. *Cf. United Seniors Assn. v. Shalala*, 182 F.3d 965, 971 (D.C. Cir. 1999) (*Chevron* deference may be appropriate even if the legal briefs contained "the first expression of the agency's views"). *But cf. Fogg v. Ashcroft*, 254 F.3d 103, 109 (D.C. Cir. 2001) ("The brief is obviously not the product either of formal adjudication or notice-and-comment rulemaking, and accordingly has no more status than the opinion letters, policy statements, agency manuals, and enforcement guidelines that the [Supreme] Court said were undeserving of [*Chevron*] deference in *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).") (parallel citations omitted).

Additionally, to the extent those agencies felt "coerced" by Congress or the courts into adopting their interpretation of preemption, the agencies' position "would not be entitled to deference under *Chevron*." *Holland*, 309 F.3d at 810. *See also id*. at 817 (*Chevron* deference only appropriate where interpretation represents "the agency's own reasoned judgment on the meaning of the statute."); *Arizona v. Thompson*, 281 F.3d 248, 259 (D.C. Cir. 2002) (agency regulation must be declared invalid "if it 'was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress' judgment that such [a regulation is] desirable' or required.") (citations omitted) (alterations in original).

Plaintiff's offer of statements from three representatives from Congress interpreting federal preemption law, *see* PEx. 1–3 to P. Memo. SJ, is similarly not entitled to consideration. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390 (2000) ("the statements of individual members of Congress" are not a "reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us.") (Scalia, J., and

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to the District's in the instant matter. In that case, the weakness of the agency's "reasoned judgment" correspondingly reduces the amount of deference owed to it. *Public Citizen*, 332 F.3d at 661.

Thomas, J., concurring); *United States v. Monsanto*, 491 U.S. 600, 610 (1989) (comments of individual legislators are of limited utility; "such postenactment views 'form a hazardous basis for inferring the intent' behind a statute . . . .") (*quoting United States v. Price*, 361 U.S. 304, 313 (1960)).

Plaintiff essentially argues that because the District is not a State, its actions here are preempted. Preemption is not so easily claimed. Congress, from nearly the founding of the District of Columbia, delegated to it the power to regulate commerce. *See District of Columbia v. John R. Thompson, Inc.*, 346 U.S. 100 n.9 (1953) (*citing* the Act of May 3, 1802, 2 Stat. 195, 197 (City of Washington empowered to provide for licensing and regulation of "retailers of liquors")); *see also* the Act of May 15, 1820, 3 Stat. 583, 587 (authorizing Council to provide "for licensing, taxing, and regulating, auctions, retailers, ordinaries"). The District, like the States, has long had considerable "police powers" to regulate for the public safety and welfare. *See, e.g.*, *Huffman v. District of Columbia*, 39 A.2d 558, 560 (D.C. 1944) (legitimate exercise of the District's police power to quarantine individuals, in an effort to stop the spread of communicable diseases).

Moreover, as the United States correctly noted, Statement of Interest at n.5, the D.C. Circuit considers the District a state for Commerce Clause purposes. *See Milton S. Kronheim & Co., Inc. v. District of Columbia*, 91 F.3d 193, 199–200 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). *See also LaShawn A. v. Barry*, 144 F.3d 847, n.7 (D.C. Cir. 1998) (District law to be treated as state law "rather than inferior federal law" for pendent jurisdiction analysis); *Dimond v. District of Columbia*, 792 F.2d 179, n.6 (D.C. Cir. 1986) (same).

Plaintiff also notes that the District is not defined as a State under the FRSA, but is under the HMTA. PI Memo at 27 (*citing* HMTA, 49 U.S.C. § 5102(11) ("'State' means . . . the District

of Columbia . . . ."). Such a proposition means little in light of the dozens of instances, solely in Title 49 (Transportation) in the Code of Federal Regulations, in which the term "State" is specifically defined to include the District.[27]

4. *The HMTA Does Not Preempt the Terrorism Prevention Act.*

Enacted in 1975, the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101–5127, establishes a scheme for the safe transportation of hazardous materials.

The HMTA's preemption provision, 49 U.S.C. § 5125, makes clear—and this Circuit has held—that Congress did not intend for the USDOT to exclusively occupy the field, but rather to preserve a role for states, localities, and tribes in the regulation of hazardous materials transportation. *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 891–92 (D.C. Cir. 1996) ("Although HMTA . . . established some uniform standards in the interstate transportation of hazardous materials, the Act does not, by its terms, exclude all state participation in the regulation of hazardous waste being carried within that state's borders."). *See also N.H. Motor Transp. Ass'n v. Flynn*, 751 F.2d 43, 46 (1st Cir. 1984) (citing USDOT Inconsistency Ruling IR-3, 46 Fed. Reg. 18918, 18919 (1981)). As noted, the HMTA specifically defines the District as a State. 49 U.S.C. § 5102(11).

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[27] *See* 49 C.F.R. § 17.2 ("'State' means . . . the District of Columbia . . . ."); § 18.3; § 20.105; § 24.2; §29.1005; § 32.665; § 80.3; § 105.5; § 107.1; § 171.8; § 190.3; § 191.3; § 192.3; § 198.3; § 219.5; § 241.5; § 266.1; § 355.5; § 367.1; § 383.5; § 387.5; § 390.5; § 397.65; § 1572.301. This listing does not include those regulations that otherwise treat the District of Columbia as a State. *See, e.g.*, 49 C.F.R. §§ 21.23, 27.5, 661.3. This listing also does not include those laws codified in Title 49 of the United States Code that explicitly define "State" to include the District. *See, e.g.*, 49 U.S.C. § 5302 (a)(13) ("'State' means . . . the District of Columbia . . . ."); § 6102(3) (same).

Rather than categorically preempt all state, local, and tribal hazmat requirements, § 5125 sets out three tests for determining whether such requirements are preempted. First, such regulations are preempted if they concern one of five "covered" subjects, and are not substantively the same as the federal requirement on that subject. Second, such regulations are preempted if it is impossible to comply simultaneously with the regulation and a federal requirement. *Id.* § 5125(a)(1).[28] Finally, such regulations are preempted if the state or local requirement is "an obstacle to accomplishing and carrying out" federal hazardous materials law or regulations thereunder. *Id.* § 5125(a)(2).

This Circuit has held that preemption under the "obstacle" test requires that the challenged state, local, or tribal requirements "pose an obstacle to fulfilling explicit provisions, not general policies, of HMTA." *Massachusetts*, 93 F.3d at 895.

The Terrorism Prevention Act does not address a "covered" subject. As a regulation of transportation routes, the TPA does not fall into a regulatory area reserved to the federal government. Hazmat routing is not one of the five "covered" subjects that § 5125(b)(1) of the HMTA explicitly reserves to the federal government.

Moreover, the Terrorism Prevention Act does not render it "impossible" to comply with federal requirements. No federal statute or regulation *requires* hazardous materials to be

[28] These subjects are: (1) the designation, description, and classification of hazardous material; (2) the packing, repacking, handling, labeling, marking, and placarding of hazardous material; (3) the preparation, execution, and use of shipping documents related to hazardous material and the requirements related to the number, contents, and placement of those documents; (4) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material, and (5) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous materials. 49 U.S.C. § 5125(b)(1).

transported through the Capitol Exclusion Zone.[29] It is therefore possible to comply simultaneously with the Bill and the requirements of federal law.

Plaintiff, like the United States, engages in sloppy semantics here, asserting that it is "impossible" to comply with the TPA because it does not permit CSXT to exercise the "routing flexibility" allowed by federal regulations. *Cf.* PI Memo at 34 and U.S. Statement of Interest at 13. But the Terrorism Prevention Act arguably restricts plaintiff in ways that the federal law does not, which is *not* the same as saying that it is "impossible" for CSXT to comply with both laws. To be entitled to preemption here, CSXT must show that it *cannot* comply with both the HMTA and the TPA. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 540 (1977) (no conflict preemption if it is possible to comply with local law "without triggering federal enforcement action."). Plaintiff has not identified a single federal requirement it would violate by complying with the TPA.

The record clearly shows that plaintiff *can* comply simultaneously with the District law and federal law, hence the TPA is not preempted under this test.

The Terrorism Prevention Act is similarly not an obstacle to carrying out the HMTA's quick-transportation mandate. Plaintiff alleges that the TPA is an obstacle to compliance with federal law, because it will prevent the shipment of hazardous materials from being "expedited." Complaint ¶ 101. Plaintiff refers to the "federal speedy-transport mandate," *New Hampshire Motor Transport Assn. v. Flynn*, 751 F.2d at 51. That requirement is expressed in the HMTA's implementing regulations: "All shipments of hazardous materials must be transported without

[29] *Cf. Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (no implied preemption because "there is simply no federal standard for a private party to comply with.").

unnecessary delay, from and including the time of commencement of the loading of the hazardous material until its final unloading at destination." 49 C.F.R. § 177.800.

As courts have recognized, however, this regulation does not prohibit *all* state and local requirements that might have the effect of delaying hazmat shipments. Rather, "[b]y using the word 'unnecessary,' the regulations indicate that some delays are necessary and acceptable." *Plaistow*, 67 F.3d at 331. Courts have accordingly upheld routing restrictions despite the fact that the restrictions might cause transportation delays.

For example, the Second Circuit upheld New York City Fire Department regulations prohibiting the transportation of hazardous gases by tank truck unless there was "no practical alternative route" to passage through the city, noting that the regulations imposed only a "necessary delay" in view of the importance of the regulations' public safety goals. *Nat'l Tank Truck*, 677 F.2d at 275. Another federal appeals court upheld a local ordinance imposing a trucking-terminal curfew, which, according to its opponents, might result in delays of up to 12 hours in the delivery of hazardous materials by truck. The First Circuit rejected the argument that "any regime that creates the possibility of a 12-hour delay in delivery *ipso facto* automatically imposes 'unnecessary delay,'" and held that the delays occasioned by the curfew were acceptable in view of the fact that the curfew was appropriately tailored to local conditions and imposed no restriction on the delivery of hazardous materials in the State, so long as the trucking terminal at issue was not used as the point of interchange. *Plaistow*, 67 F.3d at 332.

Like the non-federal requirements at issue in the *Nat'l Tank Truck* and *Plaistow* cases, the Terrorism Prevention Act is appropriately tailored to an essentially local security condition, imposes no restriction on the transportation of hazardous materials in the District outside of a defined zone around the U.S. Capitol, and specifically authorizes shipments through the Capitol

Exclusion Zone in the absence of a "practical alternative." Whatever delay the TPA may occasion is necessary to achieve the District's legitimate security objectives.

Finally, the TPA enhances overall levels of safety and security. Routing restrictions have been reviewed for their consistency with another element of federal hazardous materials law: the assurance of nationwide safety and security. *See Nat'l Tank Truck*, 677 F.2d at 275 (city regulations not an "obstacle" to execution of HMTA, because "they plainly promote safety, which is the goal of the HMTA, while they do not overlap with any specific directives of the Secretary [of the USDOT]. The Secretary has not issued, and cannot practicably issue, specific routing requirements for localities, whose own agencies are very likely far better equipped to do so.").

As the USDOT has also recognized, however, federal law authorizes state or local governments to regulate for the purpose of eliminating or reducing a particular local safety or security hazard. USDOT Inconsistency Ruling No. IR-2, 44 Fed. Reg. 75565, 75568 (1979).

The security concerns that the TPA addresses are quintessentially local; the routes most likely to be used as alternatives to transportation through the Capitol Exclusion Zone are far less attractive targets for terrorism than the Capitol area, indeed there is no reason to believe that they would be targeted at all.

CSXT even notes briefly that the HMTA *does* allow for state or local highway routing requirements. PI Memo at n.17 (citing 49 U.S.C.§§ 5125(c) and 5112). CSXT does acknowledge that there are federal regulations governing highway rerouting of hazardous materials, the standards of which appear to be consistent with the TPA's requirements. *Id*. at n.17. *See* 49 C.F.R. § 397.67 (b):

> A motor carrier carrying hazardous materials required to be placarded or marked . . . shall operate the vehicle over routes which *do not go through or near heavily*

populated areas, places where crowds are assembled, tunnels, narrow streets, or alleys, except where the motor carrier determines that:

(1) There is *no practicable alternative*;

(2) A reasonable deviation is necessary to reach terminals, points of loading and unloading, facilities for food, fuel, repairs, rest, or a safe haven; or

(3) A reasonable deviation is required by *emergency conditions*, such as a detour that has been established by a highway authority, or a situation exists where a law enforcement official requires the driver to take an alternative route.

(c) Operating convenience is not a basis for determining whether it is practicable to operate a motor vehicle in accordance with paragraph (b) of this section.

Id. (emphasis added).

Of course, what CSXT fails to reveal, however, is that it appears that there has been almost no federal enforcement of this regulation or its predecessor. *See In re Howard Trucking Co., Inc.*, Contract Carrier Application, No. MC-133471 (Sub-No. 8), 1986 MCC LEXIS 501 (Mar. 12, 1986).

Moreover, the District of Columbia Department of Transportation ("DDOT") issued a report last year entitled "District of Columbia Motor Carrier Management and Threat Assessment Study" (Aug. 2004).[30] DDOT commissioned the study underlying that report from the USDOT's Volpe National Transportation Systems Center. *Id*. at ES.1. The report noted several "measures that can be explored to improve truck-related security" such as:

- Restricting trucks from especially sensitive areas except with special permission.

  * * *

- Creating zones with different security measures depending on the attractiveness of targets to terrorists and vulnerabilities within the zone.

Id. at ES.7.

[30] Available at http://www.ddot.dc.gov/ddot/cwp/view,a,1249,q,609850.asp

The USDOT study also explicitly recommended that the District "[d]evelop a set of truck routes to . . . improve security by barring large trucks from sensitive areas of the city, especially around the National Mall." *Id*. at ES.8. The study also proposed three different categories of roadways, including "Restricted roadways" which "are located in the area surrounding the U.S. Capitol and the White House[,] an area with unique security concerns . . ." *Id*.

Finally, CSXT fails to distinguish the *Nat'l Tank Truck* case, arguing that the USDOT had rejected a further effort by New York City to regulate hazardous material transportation "through truck design specifications." PI Memo at 35. Notwithstanding that the Terrorism Prevention Act makes no attempt to regulate through "design specifications," CSXT argues that the District could have petitioned the federal government if it felt current regulation was inadequate. *Id*. at 36. That procedure is certainly not mandatory, of course, for preemption purposes. Nor can the USDOT require a local jurisdiction, in a petition for non-preemption under HMTA, to show that its regulations address "unique" conditions, as New York City (and the USDOT itself) is aware. *See City of New York v. USDOT*, 700 F.Supp. 1294, 1306 (S.D.N.Y. 1988) (reversing and remanding USDOT denial of non-preemption application for city's regulations banning routing of spent nuclear fuel through the city, because USDOT improperly required city to make threshold showing of "exceptional circumstances").[31]

5. *The ICCTA Does Not Preempt the TPA.*

[31] Just as with other hazardous materials, *see infra* pp. 40–41, federal highway regulations require shippers of radioactive materials to reroute around densely populated areas if possible, and allow States (and the District) to designate preferred routes for those materials. *See* 49 C.F.R. §§ 397.101, 397.103. Unfortunately, just as with other hazardous materials, there does not appear to have been any federal enforcement of violations of these regulations.

CSXT contends that the challenged District legislation is entirely preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §10501(b). Complaint § 12. CSXT is incorrect.

The few cases CSXT cites on the ICCTA deal with situations and non-federal regulations that were entirely different than the anti-terrorism legislation at issue here, implicating the more routine economic considerations of railroad operations.

CSXT materially overstates the application of preemption under 49 U.S.C. § 10501(b). Federal preemption of state and local regulation over a railroad is limited to circumstances where state or local authorities attempt to use regulation as a means of foreclosing or unfairly restricting a railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce. Accordingly, §10501(b) does not prohibit the District from exercising its police power to impose nondiscriminatory regulations to protect public health and safety. As in the case of the HMTA, the ICCTA explicitly defines the District as a State. 49 U.S.C. § 10102(8).

The ICCTA was passed, *inter alia*, to continue the deregulation of the railroad industry. *See, e.g., Iowa, Chicago & Eastern Railroad Corp. v. Washington County, Iowa*, 384 F.3d 557, 558–59 (8th Cir. 2004) (ICCTA repealed much of the "economic regulation" previously conducted by the Interstate Commerce Commission). Preemption was not the primary concern of the federal law. "The statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing direct economic regulation by the States, as opposed to the incidental effects that inhere in the exercise of traditionally local police powers . . . ." *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1337 (11th Cir. 2001). *But cf. City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (case law does not support

city's argument that Congress, through ICCTA, only intended to preempt economic regulation of railroads), *cert. denied*, 527 U.S. 1022 (1999).

Here, the Terrorism Prevention Act does not deny CSXT or anyone else the right to conduct operations, and nowhere does CSXT so claim. CSXT has not alleged, much less demonstrated, that it is *incapable* of complying with the TPA; it simply would prefer to avoid the administrative burdens and costs of compliance. The burden of proof under federal preemption is not as lax as plaintiff implies, however.

ICCTA preemption is *not* intended to interfere with the non-discriminatory exercise of state police powers that are essential for the protection of public health and safety. *See Iowa, Chicago & Eastern*, 384 F.3d at 561 (ICCTA does not preempt state safety regulation setting standards for bridge safety). "Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety . . . . ICCTA did not address these problems. Its silence cannot reflect the requisite "clear and manifest purpose of Congress" to preempt traditional state regulation . . . ." *Id*.[32]

CSXT here first sought relief from the STB, "an economic regulatory agency created by the ICCTA." U.S. Statement of Interest at n.1. However, recent, controlling case law indicates

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[32] *Cf. Florida East Coast*, 266 F.3d at 1326 (city's zoning and licensing ordinances not preempted by ICCTA):

> Because the alleged encroachment upon federal jurisdiction here does not occur by the municipality's legislating in a field of historic federal presence, but through the exercise of its inherently local powers, "the principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption," *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring), place a "considerable burden" on [the railroad]. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997).

Id. at 1329 (parallel citations omitted).

that *another* federal agency, the Federal Railroad Administration ("FRA") has primary jurisdiction over railroad safety—a fact that CSXT all but ignores.[33] *See Boston and Maine Corp. v. Surface Transp. Bd.*, 364 F.3d 318, 321 (D.C. Cir. 2004) ("primary jurisdiction over railroad safety belongs to the [FRA], not the STB.") (citations omitted).

The concerns of the District addressed in the TPA are not economic in nature, but crucial to its citizens' safety and security. In light of the above, the ICCTA does not preempt the Terrorism Prevention Act.

6. *NSR's Common Carrier Obligations*

CSXT asserts that rerouting hazardous materials onto NSR's lines is simply "not feasible" because NSR would not accept the cars. P.Mem.SJ at 9. But that superficial gloss on such a complicated topic is misleading at best. *See, e.g.*, Shuman Decl. ¶¶ 26–30.

Railroads, as common carriers, have an obligation to provide rail service upon reasonable request. 49 U.S.C. § 11101(a). *See also, e.g., New York Central R. Co. v. Talisman, Long Island R. Co.*, 288 U.S. 239 (1933) (each connecting carrier owes to shippers of freight destined to points on, or routed over, railway of other carrier a public duty to deliver that freight). That obligation is not absolute, however, as a railroad may declare an "embargo" (a temporary emergency measure taken because of some disability on the part of the carrier) which may relieve the railroad from its common-carrier obligations. *See, e.g., GS Roofing Products Co. v. STB*, 262 F.3d 767, 773 (8th Cir. 2001). Embargoes are typically "justified by physical conditions affecting safety such as weather and flood damage, and tunnel deterioration, or operating

[33] CSXT grudgingly concedes only that there might be some "overlap" among the authority of the federal agencies in this general area. PI Memo at 18.

restrictions such as congestion." *Bar Ale, Inc. v. California Northern R. Co.*, STB Fin. Dkt. No. 32821, 2001 STB LEXIS 633 (July 20, 2001), at *12. However, for a railroad to validly refuse to provide service, the embargo must be "reasonable," otherwise the rail carrier may be liable for damages. *GS Roofing*, 262 F.3d at 773 (*citing* 49 U.S.C. § 11704(b)).

NSR has asserted that it would simply refuse to accept any rerouted traffic. NSR Memo at 9. However, if the customer shipping the hazardous material wanted to use NSR's lines, NSR could not reasonably refuse. Longstanding ICC (now STB) precedent holds that, as a matter of law, railroads may not simply opt out of their obligations on the basis of financial considerations, or on the basis that "the commodities in question are hazardous and, if not handled safely, could potentially expose the carriers to substantial financial liability." *Pejepscot Industrial Park, Inc.—Petition for Declaratory Order*, STB Fin. Dkt. No. 33989, 2003 STB LEXIS 253 (May 15, 2003), at * 26–27 (*citing, inter alia, Decatur County Commissioners v. STB*, 308 F.3d 710, 715 (7th Cir. 2002) ("[railroads] may not refuse to provide service merely because to do so would be inconvenient or unprofitable")); *Classification Ratings on Chemicals*, 3 ICC2d 331, 1986 ICC LEXIS 7 (1986), at *15–*16 ("Once a reasonable request for transportation of these chemicals is made, Conrail has a common carrier obligation to transport them. It necessarily follows that Conrail's attempt to unilaterally excuse itself from this requirement circumvents [the law].").

Thus, one of the main reasons that NSR has advanced for refusing to accept any rerouted traffic from CSXT—because it would "transfer the risk" to the jurisdictions NSR serves—has been expressly rejected as a reason for refusing service. NSR Memo at 9. Further, neither NSR nor plaintiff acknowledge the authority of the STB to order such rerouting in an emergency, *see* 49 U.S.C. § 11123(a), and to establish the terms of compensation for that rerouting if the railroads themselves could not agree. *Id*. at § 11123(b)(2).

7. *The FRSA Does Not Preempt the TPA.*

The FRA's enabling act has been updated in light of the terrorist incidents of 9/11. *See* Federal Railroad Safety Act ("FRSA"), *codified as amended at* 49 U.S.C. §§ 20101 *et seq*. (2005). Even a cursory review of that law reveals that Congress explicitly authorized states to act (1) where the federal government has not yet acted, and (2) allows states to impose more stringent laws in certain circumstances:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security *until* the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), *prescribes a regulation or issues an order covering the subject matter* of the State requirement. A State may adopt or continue in force *an additional or more stringent law*, regulation, or order related to railroad safety or security when the law, regulation, or order—
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.

Id. at 49 U.S.C. § 20106 (emphasis added).

"FRSA preemption is even more disfavored than preemption generally." *United Transportation Union v. Foster*, 205 F.3d 851, 860 (5th Cir. 2000).[34]

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[34] The Fifth Circuit has explained:

> When applying FRSA preemption, the [Supreme] Court eschews broad categories such as "railroad safety," focusing instead on the specific subject matter contained in the federal regulation. In sum, when deciding whether the FRSA preempts state laws designed to improve railroad safety, we interpret the relevant federal regulations *narrowly* to ensure that the careful balance that Congress has struck between state and federal regulatory authority is not *improperly disrupted* in favor of the federal government.

Id. at 860 (emphasis added) (*citing Easterwood*, 507 U.S. at 665–75).

The challenged District legislation clearly meets the FRSA's first standard, because even CSXT concedes that no federal agency has issued any regulation or order governing the rerouting of hazardous materials to avoid terrorist threats. PEx. 14 to PI Memo, at 5–6 ("Neither the FRA—nor any other federal agency—has issued any order prohibiting CSXT from transporting hazardous commodities on its lines through the District of Columbia. [N]either [the Transporation Security Administration], nor any other federal agency, has directed CSXT to reroute hazardous commodities away from its lines through the District of Columbia.").[35]

It is not simply enough for preemption here, as CSXT implies, that a federal regulation cover the same general subject matter as the challenged local legislation. Rather, in order to preempt a state regulation, the federal regulation must "substantially subsume" the subject matter of that regulation. *Easterwood*, 507 U.S. at 664; *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 352 (2000).[36]

CSXT points to no federal regulation covering the specific "subject matter" of the District's legislation, the rerouting of hazardous materials to reduce the demonstrated threat posed by incidents of terrorism in the District.[37] Neither DHS nor USDOT has issued *any*

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[35] CSXT argues that the District should not or cannot act here because the federal government has not acted. But that lack of federal action is precisely the reason given in the FRSA to authorize non-federal action.

[36] The Supreme Court found that while other statutes' use of the term "relating to" conferred broad preemptive effect, the word "covering" as used in the FRSA is a "more restrictive term" thereby narrowing the scope of possible preemption. *Easterwood*, 507 U.S. at 664 (citations omitted).

[37] DOT and DHS issued a notice last summer:

> [S]eeking comments on the feasibility of initiating specific security enhancements and the potential costs and benefits of doing so. Security measures being considered include improvements to security plans, modification of methods used

regulations addressing the security concerns created by routing hazardous materials in close proximity to major terrorism targets. *Cf.* n.37, *supra*, and n.42, *infra*, and accompanying text.[38] Thus, the Terrorism Prevention Act is not preempted by the FRSA. *See Union Pacific Railroad Co. v. California Public Utilities Comm.*, 346 F.3d 851, 868 (9th Cir. 2003) ("Without evidence of a decision that no FRA regulation was needed in this area, we must conclude that [the local entity]'s regulation is not preempted."), *cert. denied*, 540 U.S. 1104 (2004); *Plaistow*, 67 F.3d at 333 ("there is no regulation by federal authorities that provides substitute protection.").[39]

As the Supreme Court has explained, preemption under the FRSA is *not* found where the federal railroad regulations establish only "general terms" of a joint federal-state program. *Shanklin*, 529 U.S. at 352 (*quoting Easterwood*, 507 U.S. at 667). In *Shanklin*, the Court

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> to identify shipments, enhanced requirements for temporary storage, strengthened tank car integrity, and implementation of tracking and communication systems.

69 Fed. Reg. 50988 (Aug. 16, 2004). This notice does not mention the rerouting of hazardous materials as a potential method for addressing the security concerns identified by the District here. A subsequent notice indicates that the federal government considers this effort one of many "[l]ong-term actions." *See* 69 Fed. Reg. 73491, 73513 (Dec. 13, 2004).

[38] *See United Transportation Union*, 205 F.3d at 862:

> Perhaps Congress can preempt a field simply by invalidating all state and local laws without replacing them with federal laws, but the [referenced federal law] discloses no such intent. Directing the Secretary of Transportation to preempt a field is not the same as preempting a field; here, Congress has done the former.

[39] The United States here strenuously attempts to give the impression of federal action, noting that DHS and TSA have been "actively analyzing rail security matters" and have "reviewed this sector's security, using sophisticated analytical techniques, technologies, and standards" while being "deeply engaged in analysis of the security of rail shipments of hazardous materials that pose a toxic inhalations hazard, including substances covered by the [Terrorism Prevention Act]." U.S. Statement of Interest at 7. That discussion also includes this masterpiece of passive-voice bureaucratese: "Implementation of enhanced security protocols based on that review is in progress." *Id*. But despite the forceful rhetoric, neither the U.S. nor plaintiff can point to any concrete federal action that achieves what the TPA does, or expressly forbids that legislation.

determined that the federal regulations "establish a standard of adequacy" regarding specific safety devices, therefore plaintiff's state-law tort action was preempted.

Here, the federal government has manifestly *not* established a specific "standard of adequacy" to safeguard hazardous-material shipping from terrorism. To the extent the federal government has acted, it has only imposed general "security" requirements, without mandating—or precluding—rerouting of specific hazardous materials. *See* 68 Fed. Reg. at 14514, 49 C.F.R. § 800 (requiring shippers and carriers of hazardous materials to develop and implement a "security plan" aimed at "addressing and reducing security risks."); 49 C.F.R. § 172.702(a)(4) (mandating safety training for employees involved in transportation of hazardous materials, including "how to recognize and respond to possible security threats.").[40]

Because the federal government has not issued regulations "covering" the same subject matter, the Terrorism Prevention Act is not preempted by the FRSA. *See Union Pacific*, 346 F.3d at 866:

> Here, although the FRA may have had the same purpose in mind as [the non-federal entity], the FRA failed to "cover" the actual subject matter: the FRA was aware that dangers existed, but it chose to test compliance rates rather than seek to mandate compliance with any particular rule. This is insufficient to preempt [the local entity]'s regulation.

Id. (*citing Easterwood* and *Burlington N. R.R. v. Montana*, 880 F.2d 1104, 1106 (9th Cir. 1989) (holding that the state cannot "regulate train safety problems that the FRA has already addressed").

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[40] The cited "security plan" regulations themselves contain explicit authorization for State and local regulation of hazardous-material transportation security, unless (1) it is "not possible" to comply with both federal and non-federal law, or (2) the non-federal regulation "is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter." 68 Fed. Reg. at 14519. The Terrorism Prevention Act, as shown, easily qualifies under both of these tests.

Moreover, even if the District's law touches a subject already "covered" by federal law, the Terrorism Prevention Act meets the *second* standard under the FRSA, because it is necessary to reduce an essentially local safety or security hazard. *See Union Pacific*, 346 F.3d at 860 (definition of "essentially local safety hazard" requires courts to determine whether it is a hazard properly dealt with on local level and not "adequately encompassed within national uniform standards."). The TPA meets *Union Pacific*'s test—the "essentially local" security hazard is the unique position of the District of Columbia as the capital of the United States and a prime target for terrorist attacks, one of only two metropolitan areas attacked on 9/11.

The Sixth Circuit, even before 9/11, analyzed this specific section of the FRSA, and concluded that a state is authorized to take action thereunder. *Tyrrell v. Norfolk Southern Railway Co.*, 248 F.3d 517 (6th Cir. 2001). The Sixth Circuit *reversed* the trial court's finding that, under the ICCTA, the STB's "exclusive regulatory jurisdiction" preempted Ohio's safety regulation mandating minimum clearance between newly constructed (or reconstructed) tracks. 248 F.3d at 520.[41]

> A debate over whether this type of railroad regulation is an historical function of the federal government or the States is unnecessary as the Supreme Court specifically held that a presumption against federal preemption is embodied in the saving clauses of 49 U.S.C. § 20106. *See Easterwood*, 507 U.S. at 665, 668. [T]o prevail on a claim that federal regulations are preemptive, a party "must establish more than that they 'touch upon' or 'relate to'" the state regulation's subject matter. *Easterwood*, 507 U.S. at 664. Instead, "preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id*.

Id. at 524.

[41] The STB appeared as *amicus curiae* in support of the plaintiff in that case, agreeing that the Ohio regulation involved safety, and thus must be analyzed under the FRSA, not its own statute, the ICCTA. *Id*. at 521.

Here, if the FRSA does not preempt so ordinary a topic as track placement for safety reasons, it should not preempt the singularly important subject of the District's law.

The railroad in *Tyrrell* also argued, *inter alia*, that "negative preemption" prohibited the Ohio regulation, citing a previous Sixth Circuit case in which the FRA had explicitly decided not to enact the specific regulations that Ohio subsequently enacted. *Id*. (*citing Norfolk & w. Ry. v. Public Utility Comm'n of Ohio*, 926 F.2d 567 (6th Cir. 1991)). The court *rejected* that argument:

> [N]o evidence in this case demonstrates that the FRA considered track clearance requirements and explicitly decided that no regulation in the area was necessary. [C]urrently, because no FRA regulation or action covers the subject matter of minimum track clearance, the Ohio regulation serves as a permissible gap filler in the federal rail safety scheme.

Tyrrell, 248 F.3d at 525 (citations omitted).

CSXT's preemption claims must be rejected pursuant to the specific terms of the FRSA.[42]

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[42] One citation provided by CSXT indicates that the TSA, almost two years ago, "determined that, for the present, [current measures] adequately address the security concerns of which it is aware." 68 Fed. Reg. 34474 (June 9, 2003). However, CSXT does not reveal that that pronouncement was taken in the narrow context of employee-security concerns regarding the transportation of explosives. *See id.* at 34470 ("[T]he transportation of explosives via rail by certain persons described under the Safe Explosives Act does not pose a sufficient security risk warranting further regulation at this time."); *id*. at 34474 (terrorist attacks of 9/11 "indicate the need to assess the security of hazmat shipments, including individuals in a position to have access to sensitive information regarding, or the ability to control the movement of, explosives and other hazmat.").

Even had TSA (or another federal agency) been more explicit regarding their decision not to adopt regulations on the subject matter covered by the Terrorism Prevention Act, that statement would provide little support for plaintiff's claim of preemption.

> It is quite wrong to view that decision [not to adopt a regulation] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation. [I]ndeed, history teaches us that a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards. [T]hus, although the Coast Guard's decision not to require [specific devices for boats] was undoubtedly intentional and carefully considered, it does not convey an "authoritative" message of federal policy against [the devices].

8. *The Terrorism Prevention Act Does Not Violate the Home Rule Act.*

Finally, plaintiff makes the essentially throw-away argument that the Terrorism Prevention Act was enacted in violation of the Home Rule Act ("HRA"), because it purportedly "applies to conduct beyond the boundaries of the District," and because there was "no true emergency" motivating the Council. Complaint ¶¶ 112–114 (*citing* HRA, *codified as amended at* D.C. Official Code §§ 1-201.01 *et seq.* (2001 ed.)); PI Memo pp. 38–40.

While it is true generally that the terms of the HRA limit the Council from enacting legislation that is "not restricted in its application exclusively in or to the District," D.C. Official Code § 1-206.02(3), the TPA does not, by its explicit terms, operate outside the District. Thus, plaintiff's Commerce Clause claim entirely subsumes the first part of its HRA claim, and is effectively refuted by the District *supra*.

The TPA was initially passed as emergency legislation, effective for only 90 days. *See* D.C. Official Code § 1-204.12(a). As such, it need not be presented to Congress for review. *Id*. at § 1-206.02(c)(1); *Bliley v. Kelly*, 23 F.3d 507, 509 (D.C. Cir. 1994). The United States here repeats the assertion made by the USDOT at the STB, alleging that the TPA could be "renewed" for "successive ninety-day periods." U.S. Statement of Interest at 1. As the District has pointed out, however, this assertion is incorrect as a matter of law. *See In re O.M.*, 565 A.2d 573 (D.C. 1989) (once emergency legislation expires, Council has no authority to pass substantially identical act in response to same emergency), *cert. denied*, 494 U.S. 1086 (1989).

While the Council could pass a second emergency act to bridge the gap between the expiration of the first emergency act and final enactment and review by Congress of a

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Sprietsma, 537 U.S. at 65–67. *See also Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994) (suggesting that "negative exercises of federal authority" have little preemptive effect).

subsequent temporary and/or permanent statute, there would have to be temporary and/or permanent legislation proposed to Congress to support the successive emergency act. *See U.S. v. Alston*, 580 A.2d 587 (D.C. 1990) (Council could pass second substantially similar emergency act to maintain *status quo* during Congressional review period). Consequently, the Council could *not* simply enact successive emergency acts and bypass the right of Congressional review of the TPA.

The District of Columbia Court of Appeals has noted that "[t]he Council considers a situation to be an emergency when immediate legislative action is required for '[the] preservation of the public peace, health, safety and general welfare.'" *District of Columbia v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1352 (D.C. 1980) (*en banc*). In that case, the court specifically noted that it did not reach the question of whether local courts were authorized to review the validity of the Council's determination that an emergency exists. *Id*. at 1353 n.11. *Cf. Atchison v. Barry*, 585 A.2d 150, 157 (D.C. 1991) (Council's determination of emergency is entitled to "substantial deference"). As the D.C. Court of Appeals has indicated, "the test is whether the factual situation is such that there is actually a crisis or emergency which requires immediate or quick legislative action for the preservation of the public peace, property, health, safety or morals." *Id*. (*citing AFGE v. Barry*, 459 A.2d 1045, 1050 n.9 (D.C. 1983)).

As shown above, because no federal agency has acted to address the specific threats covered in the Terrorism Prevention Act, despite the continuing nature of those threats, the Court should defer to the Council's determination that an emergency exists requiring immediate action to protect public safety.

To the extent plaintiff claims injury from the alleged failure of the District to comply with the HRA's requirements for "emergency" legislation, that claim is insufficient, alone, to

confer standing. *See Dimond*, 792 F.2d at 191 (citations omitted). *Cf. Brandon v. District of Columbia*, 823 F.2d 644, 649 (D.C. Cir. 1987) (District does not violate individual's due process rights by deviating from its own procedures).

C. The Balance of Equities Favors Denying Emergency Injunctive Relief.

Plaintiff asks this Court to take the extraordinary act of forbidding the District from exercising its authority to enact laws to protect its citizens. The balance of equities tips decidedly in favor of the defendants where plaintiff essentially is asking this Court to issue a mandatory injunction at the onset of the case. In other words, plaintiff seeks the ultimate relief at the beginning of the litigation. An injunction would substantially injure the District, its citizens, and, potentially, the legislative process. "[A]ny time a State [or local government] is enjoined by a court from effectuating statutes enacted by the representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *District of Columbia v. Greene*, 806 A.2d 216, 233 (D.C. 2002) (*per curiam*) (*quoting New Motor Vehicle*).

Regardless of how many times plaintiff repeats the statement, the District is not improperly attempting to "shift the risk" to other jurisdictions. Obviously, rerouting some trains carrying hazardous materials may increase the extraordinarily slight risk of *accidents*, if for no other reason than that the affected cars are spending more time in transit than they would otherwise. But because the District of Columbia is under a *unique* risk of intentional, terrorist attack, the rerouting of the covered materials to other areas would effectively *eliminate* that risk, not shift it elsewhere. Consequently, the "balance of the equities" analysis must take into account the tremendous benefits to public safety and security gained by the rerouting of the covered materials.

Similarly, plaintiff and others repeatedly insist that railroad cars handling hazardous materials are "specially designed and constructed" according to federal standards. Complaint ¶ 32; PI Memo at 13. But what plaintiff fails to explain is that, to the extent there is a national hazardous material transportation regime, it is based virtually entirely on the historical experience of, and potential for, *accidental* releases of those materials, *not* on the potential for *deliberate* terrorist attacks. *See* PEx. 4 to PI Memo, at 3–4 (testimony of George Gavalla, Federal Railroad Administration). In Mr. Gavalla's written testimony, he discussed "Tank Car Survivability," but review of that discussion of the mechanical and structural improvements to the cars reveals that those enhancements are almost entirely based on the risks posed by *accidents* such as derailments.[43] The record is bare of evidence that the federal government has imposed *any* structural or mechanical standards for improved rail-car safety based on the risk of *intentional* acts.

Plaintiff has made every effort to avoid confronting a fundamental flaw in its assumptions: that the risks associated with a release of hazardous materials are *not* limited to those caused by accidents.

> There are two distinct risks associated with the transportation of hazardous materials. First, there is a *transportation risk* associated with the release of chemicals as a result of an accidental collision, derailment, or other mishap. Second, there is a *terrorism risk* associated with an *intentional act* to release these chemicals into the environment for the purpose of creating property damage and personal injury.

PEx. 7 at 1–2 (Joint Testimony of DDOT, Fire and Emergency Medical Services Department, Metropolitan Police Department, and D.C. Emergency Management Agency) (emphasis added).

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[43] *See id.* (discussing "need for extra protection of tank heads, particularly in derailments . . . ." [Head shields] provide extra puncture resistance for the tank heads in accidents." [S]ubsequent accidents involving cars with these materials and design modifications have shown them to be highly effective." "Fittings on the bottoms of tank cars are susceptible to damage when they derail.").

In these circumstances, the District of Columbia and its citizens has the balance of the equities in their favor.

D. The Public Interest Favors the District.

It should go without saying that the public interest is served by allowing the District to attempt to protect its citizens from a universally acknowledged threat. The Terrorism Prevention Act represents the legislature's reasonable action taken in the public interest. It is plaintiff's financial self-interest, not the public interest, which is at the root of this complaint. *See Dimond*, 792 F.2d at 192–93 ("A government entity such as the District of Columbia is charged by law with representing the public interest of its citizens. [The proposed intervenor], on the other hand, is seeking to protect a more narrow and "parochial" financial interest not shared by the citizens of the District of Columbia.").

CSXT's parochialism cannot trump the District's fundamental right and obligation here to protect its citizens. The District of Columbia acts here in its most basic role "as a guardian and trustee for its people." *White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 207 n.3 (1983).[44]

[44] To the extent the Court is inclined to grant either of plaintiff's motions, the District notes here that the District of Columbia has a law on severability, D.C. Official Code § 45-201 (2001 ed.), which requires that, if any portion of any act of the Council is held invalid, "the declaration of invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision . . . ." *Id*.

Thus, to the extent the Court invalidates any portion of the TPA, the remainder of the law should remain in full force and effect. *See RDP Development Corp. v. District of Columbia*, 645 A.2d 1078, 1082 n.18 (D.C. 1994) (provision allows severability of invalid portions of District legislation, unless the Council has included a non-severability clause in the suspect litigation). Here, the Council did not include a non-severability clause within the TPA. *Cf. Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1394 (D.C. Cir. 1990) (even if no severability clause, question for courts becomes whether legislature would have enacted the other provisions

The public interest here therefore favors the denial of injunctive relief.

E. CSXT is Not Entitled to Summary Judgment.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering CSXT's motion, all evidence and the inferences to be drawn from it must be considered in a light most favorable to the District. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 579 (D.C. Cir. 1998).

Summary judgment may not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). Where more than one plausible inference can be drawn from the undisputed facts, summary judgment is not appropriate. *See United States v. Spicer*, 57 F.3d 1152, 1160 (D.C. Cir. 1995).

Here, as noted, the affidavits and limited discovery clearly reveal a number of material facts in dispute.

III. Conclusion

"The problems confronting society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution." *PhRMA*, 538 U.S. at 667 (*quoting New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 413 (1973)).

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in the absence of the challenged provision; "In such an inquiry, the presumption is always in favor of severability.") (*citing Regan v. Time*, 486 U.S. 641, 653 (1984)).

Plaintiff has failed to satisfy the requisite elements of the four-part test for emergency injunctive relief. Accordingly, its motion for a preliminary injunction should be denied. Moreover, plaintiff has failed to carry its burden on its motion for summary judgment. That motion too should be denied.

DATE: March 14, 2005

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC., Plaintiff,	)	
v.	)	Civil Action No. 05-0338 (EGS)
ANTHONY A. WILLIAMS, *et al*., Defendants.	)	

ORDER

This case is before the Court for consideration of Plaintiff's Motion for a Preliminary Injunction, Defendants' Memorandum Of Points And Authorities In Opposition thereto, and Plaintiff's Reply. After review of the parties' submissions, oral argument of counsel, and the entire record herein, it is hereby:

ORDERED, that Plaintiff's Motion for a Preliminary Injunction be, and the same is hereby, DENIED.

SO ORDERED.

DATE: _____

_____
EMMET G. SULLIVAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC., Plaintiff, v. ANTHONY A. WILLIAMS, *et al*., Defendants.	)	Civil Action No. 05-0338 (EGS)

ORDER

This case is before the Court for consideration of Plaintiff's Motion for Summary Judgment, Defendants' Memorandum Of Points And Authorities In Opposition thereto, and Plaintiff's Reply. After review of the parties' submissions, oral argument of counsel, and the entire record herein, it is hereby:

ORDERED, that Plaintiff's Motion for Summary Judgment be, and the same is hereby, DENIED.

SO ORDERED.

DATE: _____

_____
EMMET G. SULLIVAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 05-0338 (EGS)
ANTHONY A. WILLIAMS, *et al*.,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE

Pursuant to Fed. R. Civ. P. 56(e) and LCvR 56.1, defendants (collectively, "District"), by and through undersigned counsel, hereby respectfully submit their Opposition to the Plaintiff's Statement Of Material Facts As To Which There Is No Genuine Issue in the above-captioned case.

Plaintiff's Statement Of Material Facts As To Which There Is No Genuine Issue ("PSMF") fails to identify all material facts at issue here, and contains considerable argument and legal conclusions masquerading as facts. *See, e.g., Robertson v. American Airlines, Inc.*, 239 F.Supp. 2d 5, 8–9 (D.D.C. 2002) (statement of undisputed material facts should "logically and efficiently" review relevant background facts, cite to the record, and should *not* "contain argument") (emphasis added) (*citing Jackson v. Finnegan, Henderson*, 101 F.3d 145, 153 n.6 (D.C. Cir. 1996)). *See also Twist v. Meese*, 854 F.2d 1421, 1425 (D.C. Cir. 1988) (burden is on parties to "isolate the facts that are deemed to be material, and to distinguish those facts which are disputed from those that are undisputed.").

Because of plaintiff's failure to identify several material facts in genuine dispute, the District files concurrently herewith (and incorporates by reference) its own Statement of Material Facts as to Which There is a Genuine Dispute ("DSMF").

In response to the numbered paragraphs of the PSMF, the District responds as follows:

1. The District does not dispute paragraph 1 of the PSMF.

2. The District does not dispute paragraph 2 of the PSMF.

3. The District does not dispute paragraph 3 of the PSMF.

4. The District objects to paragraph 4 of the PSMF because it contains a legal conclusion, *i.e.*, what the District's Terrorism Prevention Act regulates.

5. The District does not dispute paragraph 5 of the PSMF.

6. The District objects to paragraph 6 of the PSMF because the "fact" asserted is immaterial, if not irrelevant.

7. The District objects to paragraph 7 of the PSMF because the "fact" asserted is immaterial, if not irrelevant.

8. The District objects to paragraph 8 of the PSMF because, while propane and chlorine are among the materials implicated by the Terrorism Prevention Act, the remaining "facts" asserted are immaterial, if not irrelevant.

9. The District objects to paragraph 9 of the PSMF because it contains argument and legal conclusions, *i.e.*, "[i]t is lawful to transport the Banned Materials [sic] in interstate commerce . . . ."

10. The District objects to paragraph 10 of the PSMF because it contains argument and legal conclusions (*re*: CSXT's "statutory duty under present law" as a common carrier).

11. The District does not dispute paragraph 11 of the PSMF.

12. The District does not dispute paragraph 12 of the PSMF.

13. The District objects to paragraph 13 of the PSMF because it contains argument.

14. The District does not dispute paragraph 14 of the PSMF.

15. The District objects to paragraph 15 of the PSMF because, while undisputed, this fact is immaterial, if not irrelevant.

16. The District objects to paragraph 16 of the PSMF because it contains argument. The District does not dispute that rerouting, if required under the TPA, would add miles and transit time to the rerouted railcars. But that "fact" is incomplete at best. The record reflects that CSXT's feared injuries are substantially less grave than it implies. *Cf.* Gibson Depo. at 105 and Shuman Decl. ¶ 23e.

17. The District does not dispute paragraph 17 of the PSMF, but notes that CSXT only discusses alternative routes that it owns, and *not* any other routes that may be available to it from any other railroads, a material fact that is in genuine dispute. Gibson Depo. at 61; Shuman Decl. ¶¶ 28–29.

18. The District does not dispute paragraph 18 of the PSMF, but notes that the "fact" is incomplete; the asserted increase in distances and handlings are not the only effects of any TPA-required rerouting, which must also include the benefits to the District accruing from reducing the risk of terrorist attack. *See* Defendants' Memorandum in Opposition at 7 & n.7; Shuman Decl. ¶¶ 11, 14–16.

19. The District objects to paragraph 19 of the PSMF because it contains argument and is incomplete. While the asserted "factors" all tend to increase the "inherent risk of transporting hazardous materials," that risk, as the record demonstrates, has historically been measured

almost exclusively on the risk of *accidents*, not the risk of intentional terrorist attack. Defendants' Memorandum in Opposition at 7 & n.7; Shuman Decl. ¶¶ 11, 14–16.

20. The District does not dispute paragraph 20 of the PSMF.

21. The District objects to paragraph 21 of the PSMF because it is irrelevant and incomplete. Plaintiff has presented no evidence that it would be required to reroute through New York City, arguably the only other jurisdiction facing a similar level of risk of terrorist attack as the District itself. *See* Defendants' Opposition at 25 & n.20.

22. The District objects to paragraph 22 of the PSMF because it contains argument and legal conclusions, *i.e.*, rerouting "would preclude CSXT from utilizing its rail network, equipment and personnel in the most efficient manner, decreasing its capacity and flexibility to transport freight." Even if a reroute were required under the TPA, CSXT has not shown that its "efficien[cy]," "capacity and flexibility" would be significantly or permanently impaired. Shuman Decl. ¶¶ 9–10, 23e–23g.

23. The District objects to paragraph 23 of the PSMF because it is immaterial and irrelevant. Whether or not other jurisdictions could pass similar legislation is irrelevant to the disputed material fact that the District faces a unique threat of terrorist attack not faced by any other jurisdiction, with the possible exception of New York City.

24. The District objects to paragraph 24 of the PSMF because it contains argument and legal conclusion, and the "fact" asserted is immaterial and irrelevant.

25. The District objects to paragraph 25 of the PSMF because it contains argument; the District does not dispute that the United States made the referenced filing, but avers that the characterization of that filing and its import are legal conclusions appropriate for the Court.

DATE: March 14, 2005 Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CSX TRANSPORTATION, INC., Plaintiff,	)	
v.	)	Civil Action No. 05-0338 (EGS)
ANTHONY A. WILLIAMS, *et al*., Defendants.	)	

DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS A GENUINE DISPUTE

Pursuant to Fed. R. Civ. P. 56(e) and LCvR 56.1, defendants (collectively, "District"), by and through undersigned counsel, hereby respectfully submit this Statement Of Material Facts As To Which There Is A Genuine Dispute in the above-captioned case.

Many of plaintiff's arguments require the resolution of material factual disputes, which precludes the grant of summary judgment here.

1. The District of Columbia is under a unique risk of terrorist attack, the level of which is unmatched by any other jurisdiction except possibly New York City. Department of Homeland Security, Enhanced Security Procedures for Operations at Certain Airports in the Washington, D.C., Metropolitan Area Flight Restricted Zone, 50 Fed. Reg. 7150, 7152–53 (Feb. 10, 2005); District of Columbia Motor Carrier Management and Threat Assessment Study (Aug. 2004), at ES.8 (available at http://www.ddot.dc.gov/ddot/cwp/view,a,1249,q,609850.asp).

2. Even if a reroute were required under the Terrorism Prevention Act, CSXT's own evidence shows that such a reroute would affect approximately 0.03% of its total national rail traffic. *Cf.* Complaint ¶¶ 7, 67 and Shuman Decl. ¶ 23.

3. Such rerouting, even if required, would also add less than 200 miles to the average distance traveled by any individual railcar. Gibson Depo. at 72.

4. The evidence presented by CSXT is inconsistent regarding the numbers of rail cars potentially affected by any rerouting. *Cf.* Complaint ¶¶ 7, 67; PEx. 14 to PI Memo at 9; Gibson Depo. at 105; and Shuman Decl. ¶ 23.

5. CSXT has not made a threshold showing of any potential financial impact on it of any TPA-required reroute. Shuman Decl. ¶ 10; Gibson Depo. at 16–17.

6. CSXT may use other railroads' lines to transport its traffic. Osborne Depo. at 92; Shuman Decl. ¶¶ 26–29.

7. The Surface Transportation Board may order a railroad to allow another railroad to use its lines. 49 U.S.C. § 11123.

8. A railroad may not refuse hazardous-material traffic for safety reasons (*i.e.*, on the basis of the perceived risk of carrying that traffic). *Pejepscot Industrial Park, Inc.—Petition for Declaratory Order*, STB Fin. Dkt. No. 33989, 2003 STB LEXIS 253 (May 15, 2003), at * 26–27; *Decatur County Commissioners v. STB*, 308 F.3d 710, 715 (7th Cir. 2002); *Classification Ratings on Chemicals*, 3 ICC2d 331, 1986 ICC LEXIS 7 (1986), at *15–*16.

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